

Mobility Rules for Investors, Business Owners and other Business People in Germany: Focus-Study by the German National Contact Point for the European Migration Network (EMN)

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Federal Office
for Migration
and Refugees



Mobility Rules for Investors, Business Owners and other Business People in Germany

Focus-Study by the German National Contact Point
for the European Migration Network (EMN)

Working Paper 61

Michael Vollmer



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Mobility Rules for Investors, Business Owners and other Business People in Germany

Focus-Study by the German National Contact Point
for the European Migration Network (EMN)

Michael Vollmer

Federal Office for Migration and Refugees 2015

Summary

This focussed study was prepared by the German National Contact Point for the European Migration Network (EMN) at the Federal Office for Migration and Refugees and is the German contribution to the European Synthesis Report “Admitting third-country nationals for business purposes”.

It deals with the preconditions under the German residence law and the organisational requirements which immigrant investors, self-employed persons and other business persons need to meet to invest in Germany and/or found a business there.

Business-related mobility has turned out to be a very dynamic area, which is why it is difficult to prepare and obtain reliable statistics. While it is possible to establish the number of self-employed persons who have entered and are resident in Germany pursuant to section 21 of the German Residence Act (AufenthG), there are no statistical figures on the number of investors who have actually travelled to Germany.

In addition, it is not always possible to distinguish clearly between investors and self-employed entrepreneurs. Apart from residence-law issues, no distinction between investors and self-employed entrepreneurs is made.

Residence-law issues are the only area where third-country nationals need to comply with other requirements for the establishment of a company than Germans or other citizens of the European Union (EU) or the European Economic Area (EEA). During the last few years, legal requirements for foreign investors and entrepreneurs have been eased. For example, the minimum investment amount of EUR 250,000 was abolished in 2012.

Moreover, there have been several amendments to legal provisions concerning employment, which also affect the activities of immigrant investors and entrepreneurs. For example, the Assessment and Recognition of Foreign Professional Qualifications Act (the

so-called Recognition Act) and the Employment Ordinance have been amended. While it is not yet possible to establish a causal relationship between the new rules and an increase in the number of self-employed, these measures will make the economic system more flexible and make it easier for employees to become self-employed.

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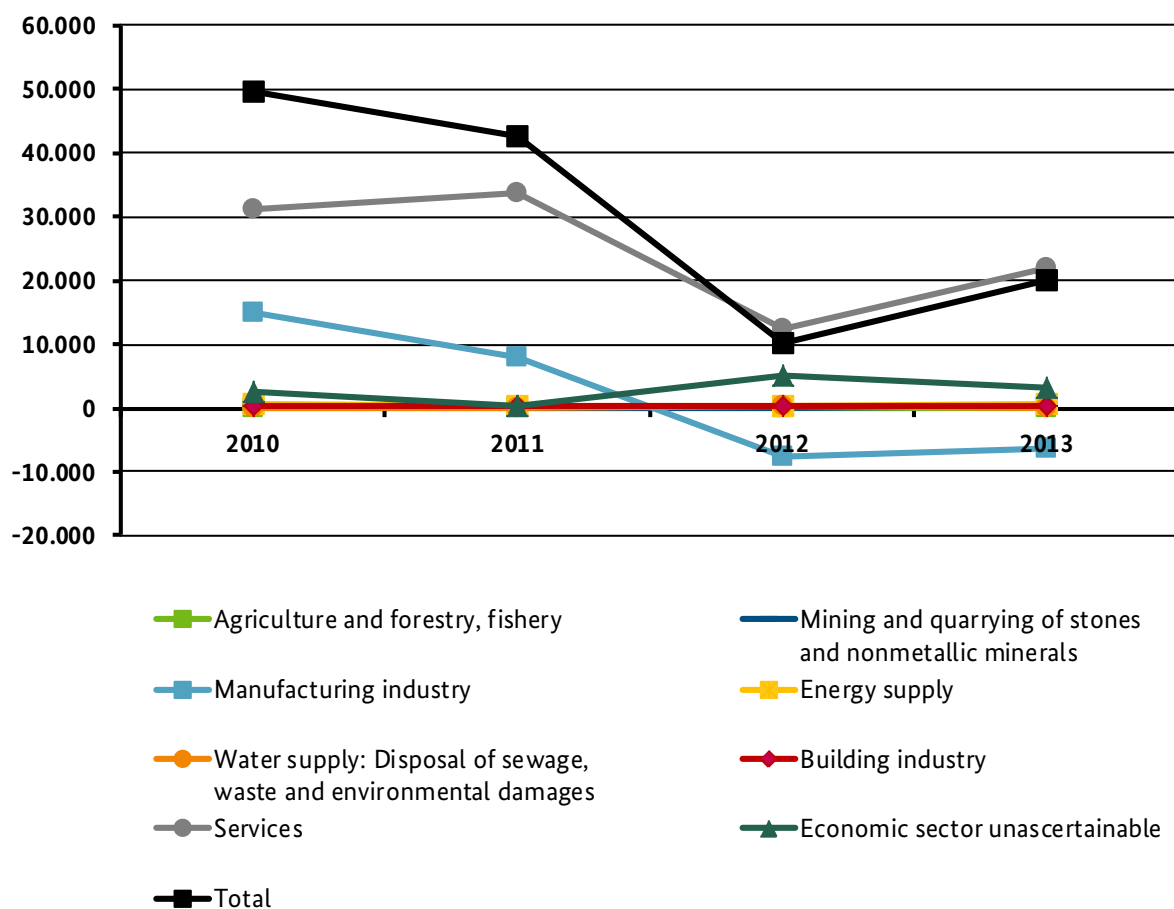
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1 Introduction

With roughly 80.8 million inhabitants, Germany is the biggest market for commercial products and services in the European Union. In addition, as exports make up a large share of its national accounts, it also has closer links to the global economy than almost any other country. Germany has therefore a major interest in open markets and stable political situations in its export destinations. With the trend towards a world-wide division of labour picking up speed, the country is also interested in remaining attractive for foreign investors and entrepreneurs. The framework conditions are favourable. Thanks to its central location in Europe, its reliable transport network, its political and legal stability, the good education and training level of

its workforce and the low frequency of strikes, Germany enjoys good fundamental conditions. In addition, it can rely on well-established university and research institutions, which have proven their innovativeness, can hold their own in international competition and may contribute to capital imports. Still, even the best starting conditions are no guarantee that foreign capital inflows will remain high (see chart 1). Other factors, in particular the framework conditions for foreign direct investment in other target countries, will influence global capital accumulation. That is why Germany needs to make regular efforts to attract investors' capital in order to ensure that it remains an attractive business location.

Chart 1: Foreign direct investment in Germany (EUR m)



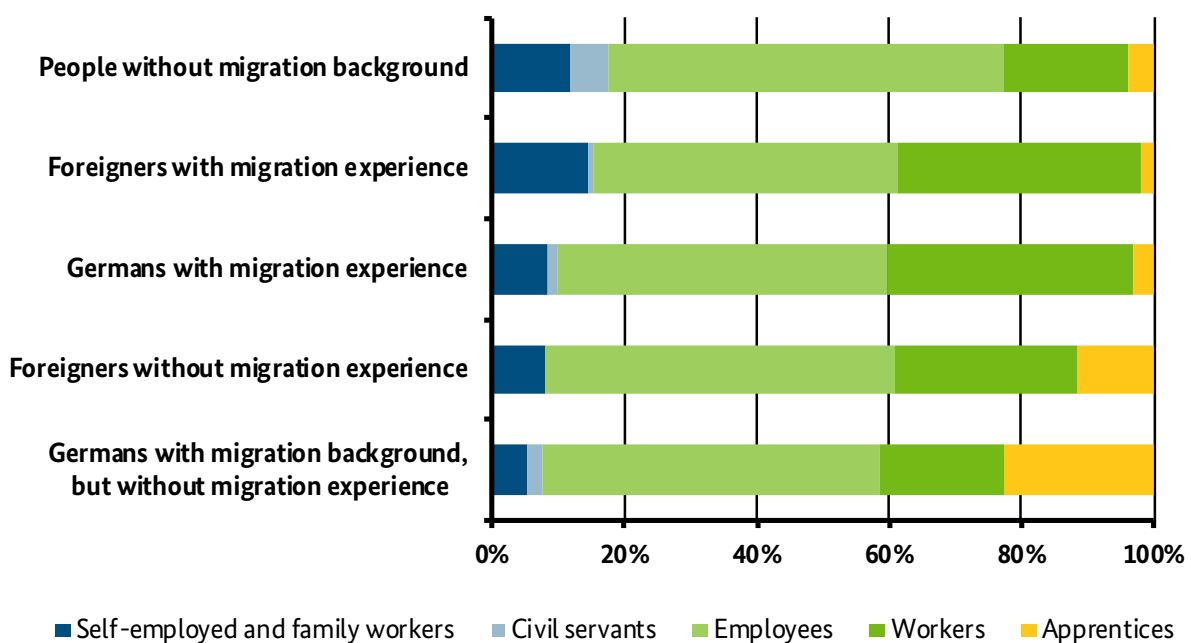
Source: Deutsche Bundesbank 2014

Germany has started numerous activities in this respect. Businesses founded by immigrants in general and by third-country nationals in particular make an important contribution to overall investment activity in Germany. This is a complex issue, which has been increasingly the object of research in the last few years. However, this aspect is often neglected in the public debate, which tends to focus on the assumption that the unemployment rate among immigrants is above the average. In fact, however, many immigrants successfully earn their living as self-employed business owners. Moreover, many of them generate part of their sales in their countries of origin and thus are not only part of the economy as a whole, but play an important role for Germany's image abroad (see chart 2).

This focussed study was prepared in the framework of the European Migration Network (EMN). Just like its counterparts drafted by the other participating EU Member States and Norway, it adheres to uniform specifications and a pre-determined structure and will be included in a comparative synthesis report, which will also take account of the studies prepared by the other national EMN Contact Points.

The study focuses on the legal framework conditions for investors and self-employed persons and the most important activities which Germany pursues to attract investors and entrepreneurs. It focuses on three groups of people: on investors, on self-employed persons and on a third group which is important for the economy and consists of skilled workers, managers and trainees transferred to Germany, of business travellers and of commercial agents.

Chart 2: Gainfully employed population by migration and professional status (2012)



Source: Statistisches Bundesamt 2013

Among the definition of the term “foreign investor” and a description of different types of investment (2.1), chapter 2 furthermore defines “entrepreneur” and “self-employment” (2.2) and focuses on several groups of other business persons, i.e. business travellers, intra-corporate transferees, graduate trainees and independent commercial agents (2.3).

Chapter 3 focuses on general conditions, whereby part 3.1 gives an overview of the most important players in the field of investor and entrepreneur acquisition. As the German government does not actively channel foreign funds into specific sectors, chapter 3.2 focuses on structural policies, spatial planning and innovation promotion, which are the most important passive

instruments used to direct investments in certain regions or economic sectors. Existing bilateral agreements play a major role, too. Chapter 3.3 deals with existing investment promotion and investment protection agreements as well as double taxation agreements, which are also important instruments for attracting investors and entrepreneurs.

Amongst residence-law provisions like Schengen and national visa, residence and settlement permits, chapter 4 deals with conditions for family reunification.

Since the economic and the labour market situation are constantly changing and many German business owners were dependent employees before they founded their own business, chapter 5 describes first which conditions immigrants need to meet for gainful employment. The subsequent parts of the chapter give an overview of necessary professional qualifications (5.1), of the foundations and the documents needed to establish a business (5.2) and of the different types of business (5.3), which are based on different legal foundations. This, in turn, may affect residence-law issues.

While chapter 6 deals with the prevention of abuse of the legal provisions, chapter 7 gives a short overview of recent, periodical studies and statistics and topical research on investors, self-employed persons and other economic agents. Chapter 8 focuses on current problems and obstacles, while chapter 9 gives some examples of best practice.

2 Definition framework

The following chapter deals with definitions of the terms “foreign investor” and “self-employed entrepreneur” and gives an overview of the conditions and regulations for other business people in Germany.

2.1 Investors

2.1.1 General legal conditions

In its principles the German Foreign Trade and Payments Act (Außenwirtschaftsgesetz, AWG) says that the “trade in goods, services, capital, payments and other types of trade with foreign territories as well as the trade in foreign valuables and gold between residents (foreign trade and payments) is, in principle, not restricted” (section 1 of the Foreign Trade and Payments Act). This Act also applies to foreign investors. However, on the base of the Foreign Trade and Payments Act as well as on other laws and statutory regulations there are specific provisions for certain economic areas. For example, provisions for the protection of rare or protected species, special security provisions in transport, restrictions concerning the trade with defence goods and investment provisions for sensitive economic areas, such as the energy sector (Germelmann/Lecheler 2010) may apply. They must be adhered to on pain of criminal-law consequences. Generally speaking, however, foreign investors who plan to invest in Germany are not subject to particular requirements or restrictions. At first, that means that the economic and legal framework conditions are the same for foreign investors as for Germans or other EU citizens – it starts with construction and spatial planning rules, continues with qualification and reliability standards and ends with social security standards, labour security and protection rules for future employees of a business. At a later stage, tax provisions may result in a different treatment of foreign investors (see chapter 3.3.2).

2.1.2 Foreign investor

There is no official and binding definition of the term “foreign investor”, neither in the Residence Act nor in any other legal instrument. While the Securities Trading Act (Wertpapierhandelsgesetz, WpHG) contains a general definition of the term “client” in section 31a, this definition refers mainly to institutional investors who have considerable funds at their disposal. German economic and corporate law recognises individuals, partnerships and corporations, i.e. “natural” and “legal” persons. Put simply, foreign investors can be defined as individuals, partnerships or corporations which are domiciled abroad and want to export capital in order to acquire assets or extend their existing holdings in Germany. They have numerous opportunities to do so. In fact, investments are not limited to the transfer of money; rather, foreign direct investments (FDI) may also involve shifting goods, machinery and equipment or knowledge to Germany (see Chapter 2.1.4).

2.1.3 Foreign direct investment

Just as there is no definition of the term “foreign investor”, there is no clear, binding definition of the term “foreign direct investments”. However, investment activities tend to belong to one of two major categories, one of which is less important for our current analysis: This is the category of portfolio investments. In these cases, private or institutional foreign investors buy shares in companies which are domiciled in Germany on the capital market in order to benefit from the sales and corporate revenues of these companies. As a rule, such investors are not bent on gaining control over the companies. The second category covers so-called “passive direct investments”.¹ These, too, are investments made by foreigners in Germany. However, they do not only focus on profit and return aspects, but mainly on influencing the business activities and the commercial success of German companies.

¹ “Active direct investments” are, accordingly, investment activities of German investors abroad.

In principle, the Lisbon Treaty (Art. 188c (1) and (4)) contains key EU provisions for foreign direct investment, which aim not only to protect the commercial and financial aspects of investments, but also intellectual property (Johannsen 2009).

2.1.4 Types of investment

Transfer of capital

In principle, there are no specific restrictions on the transfer of capital to Germany by third-country nationals. Thanks to the free movement of capital, money transfers can usually be made from an account in the investor's country of origin. This means that, for a large number of investments, residence-law issues do not arise. There are no legal requirements on minimum investment amounts. However, any amounts and investments which exceed a total of EUR 12,500 (or the equivalent in a foreign currency) must be reported to Deutsche Bundesbank for statistical purposes (section 67 of the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung, AWV)). However, this reporting obligation only applies to natural persons (Germans and third-country nationals) who are resident in Germany and to businesses domiciled in the country. Foreign businesses are not subject to the reporting obligation if they transfer capital from abroad to an account in Germany – not even if the account is not kept in the name of a German company, but directly in that of the foreign company. Generally speaking, foreign nationals who want to invest in particularly protected areas enjoy legal protection, but cannot invoke the economic freedom guaranteed in the Basic Law (Grundgesetz).

Generally, stakes in German companies can be purchased freely by third-country nationals. However, to avoid security risks, the Ministry for Economic Affairs and Energy (BMWi) reserves the right to check such purchases in individual cases. As a rule, the so-called “cross-sectoral examination” (section 5 sub-section 2 of the AWG; sections 55 to 59 of the AWV) applies in principle to all industries – independent from the size of the enterprise(s) involved in the purchase. Permitting procedures and registration obligations are not provided by law, but the purchase may be checked by BMWi of its own motion within three months after conclusion of the contract. To obtain legal certainty at an early stage, investors may apply for a legally enforceable and binding BMWi clearance certificate

that confirms that the acquisition would not lead to concerns of public security. Specific rules are considered for the acquisition of certain arms or IT security companies for which the so-called “sector-specific examination” (section 5 sub-section 3 of the AWG; sections 60 to 62 AWV) is to be applied. In this case special registration obligations might apply for purchasers.

Transfer of goods, machinery and knowledge

Capital transfer is only one way to invest in Germany. Material assets and knowledge may be shifted to the country as well. Within the EU, goods and machinery may be transported from one country to another without incurring tariffs. If, however, they are imported from third countries which do not belong to the EU or the EEA, tariffs and import taxes may be levied (unless there are special rules). The amount of such taxes and tariffs may be determined online via the European TARIC system (Integrated Tariff of the European Communities or TARif Intégré Communautaire). Importers can use a list of goods codes to declare their imports and give information on the country of origin and destination.² If a business is to be shifted completely or in part to Germany, import tariffs for used machinery and goods may be waived.

Knowledge transfer opens up a wealth of investment opportunities, which are subject to specific legal and protection rules under the Patent Act (Patentgesetz, PatG) and the Act on Copyright and Related Rights (Urheberrechtsgesetz, UrhG). The following items can be protected:

- Patents
- Trade marks
- Designs
- Utility models
- Copyrights and property rights
- Licences

2 This system, which integrates all measures and ordinances, can be reached via the website of the German customs authority: http://ec.europa.eu/taxation_customs/dds2/taric/taric_consultation.jsp?Lang=%20en (as of 15 Dec 2014).

Once again, the preconditions for registration and the extent of the protection are the same for Germans and third-country nationals. However, investors and foreign entrepreneurs who do not hold a residence title will need to authorise a lawyer to sign the patent application for them. The German Patent and Trade Mark Office (Deutsches Patent- und Markenamt, DPMA) in Munich, which operates within the portfolio of the Federal Ministry of Justice and Consumer Protection (Bundesministerium für Justiz und Verbraucherschutz, BMJV), is responsible for patent registration and examination.³ This office, which is usually only called “Patent Office”, is the central authority in the field of industrial property protection in Germany. It registers patents, trade marks, utility models and designs against a fee, provided that they are “novel, involve an inventive step and are susceptible of industrial application” (section 1 sub-section 1 of the Patent Act). Any patents, trade marks etc which, after the examination, are registered in Germany are protected only in Germany. Registrations for the EU as a whole must be made by the European Patent Office (EPO), which is also seated in Munich.

2.2 Business owners

The following chapter deals with entrepreneurship and self-employment, though it is not always possible to distinguish clearly between business owners and the above mentioned investors.

2.2.1 Entrepreneur

Section 14 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) says: “An entrepreneur means a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession.” This definition covers both business people and freelance professionals; note that it does not matter whether the “enterprise” is a full-time undertaking. The Value Added Tax Act (Umsatzsteuergesetz, UStG) supplements this definition by saying that an entrepreneur is a person who exercises a trade, business or

profession in a self-employed capacity. The enterprise shall cover the complete business or professional activity of the entrepreneur. An activity is to be considered a trade, business or profession if it is directed at generating revenue in the long term, even if there is no desire to generate profits or if a partnership only acts for its members (section 2 sub-section 1 of the German Value Added Tax Act).

In principle, business enterprises of third-country nationals are not subject to specific legal provisions. Immigrant entrepreneurs and/or company founders need to fulfil the same conditions, requirements and laws as German entrepreneurs, provided they comply with the residence-law (and professional, if necessary) requirements. Depending on the structure and legal form of the foreign enterprise, particular tax regulations may apply. The definition of the term “foreign entrepreneur” is largely derived from German tax law; at its core, it means that a company is domiciled abroad.⁴ Under German tax law, immigrant entrepreneurs who are resident in Germany will be treated as domestic entrepreneurs with regard to their income from self-employment.

2.2.2 Self-employed activities

According to the German Commercial Code (Handelsgesetzbuch, HGB), self-employed people can determine both their professional activities and their working hours for themselves (section 84 sub-section 1 sentence 2 HGB). This definition of self-employment is very wide. According to a list provided by the Chamber of Commerce and Industry of Berlin, it includes:

- Commercial activities, for example in wholesale or retail trade, in import and export, as broker or hotel or restaurant owner,

³ For extensive information on application formalities and enforcement procedures for existing rights see <http://dpma.de/english/service/e-services/dpmadirekt/index.html> (15 Dec 2014).

⁴ Section 13b sub-section 7 of the German Value Added Tax Act (UStG) says that, if an entrepreneur is domiciled abroad, neither his domicile nor his residence, the company headquarters, the management or the permanent establishment of his company are in Germany. The same applies if the entrepreneur is domiciled or resident in Germany, but the headquarters, the management or the permanent establishment of his company are abroad. Even if an entrepreneur has a permanent establishment in Germany, his export revenues will be treated as those of a foreign entrepreneur as long as the majority of such revenues are not generated by the permanent establishment in Germany.

- freelance activities, for example as artist (painter, musician, writer), journalist, engineer, architect or translator,
- activities in the primary sector, e.g. in agriculture or forestry,
- activities as self-employed business sellers who are asked by other companies to conduct negotiations or conclude contracts,
- activities as the general partner in a limited partnership (Kommanditgesellschaft, KG)
- activities as a partner in a general partnership (offene Handelsgesellschaft, OHG),
- activities as a partner in a registered partnership under civil law (GbR or partnership under the Civil Code),
- activities as partners of a limited liability company (GmbH) who hold a majority of the shares and therefore have a controlling influence on the company even though they are not its managing directors,
- activities as managing directors of a GmbH, provided that these managing directors also hold significant shares in the company,
- activities as Board members of public limited companies (Aktiengesellschaften, AGs) who act as representatives of a legal person,
- activities as minority shareholders of a GmbH who have formed an alliance to obtain a majority and thus control the business, and
- activities of commission agents (IHK Berlin 2014: 8).

Third-country nationals who want to pursue a self-employed activity in Germany usually need a residence title which expressly permits them to be gainfully employed. This is not necessarily the case if they hold a visa or a residence permit, but it is if they hold a settlement permit. The legal prerequisites are set out in section 21 sub-section 1 AufenthG which says:

“A foreigner may be granted a residence permit for the purpose of self-employment if

1. an economic interest or a regional need applies,
2. the activity is expected to have positive effects on the economy and
3. personal capital on the part of the foreigner or a loan undertaking is available to realise the business idea.

Assessment of the prerequisites in accordance with sentence 1 shall focus in particular on the viability of the business idea forming the basis of the application, the foreigner's entrepreneurial experience, the level of capital investment, the effects on the employment and training situation and the contribution towards innovation and research.”

These assessment criteria may be waived for freelance professions. In 2012, a passage in section 21 sub-section 1 AufenthG which obliged third-country entrepreneurs to invest at least EUR 250,000 and create at least five jobs was deleted. This means that there is no minimum investment amount. However, the rules on a business's share capital (see Chapter 5.2.4) for certain legal forms need to be observed. They apply to both Germans and third-country nationals.

In practice, the prerequisites listed in the Residence Act give broad scope for discretion and interpretation, not least because the range of self-employed activities is so broad. In principle, self-employment is compatible with other residence titles, provided it is not explicitly excluded.

2.3 Other business persons

In addition to investors and entrepreneurs or self-employed persons, German law recognises other groups of persons who cross borders for work purposes and thus fall into the purview of this study. These groups, too, play a key role in the economic system and in the employment framework. This chapter will therefore deal with business travellers, intra-corporate transferees, salespeople, free professionals, service providers and participants in trainee programmes.

2.3.1 Business travellers

There is no clear definition of the term “business traveller”. Under German tax law, business travels and delivery trips are classified as professional activities which, for a limited period of time, do not take place at a natural person’s usual place of work or living. A “limited period of time” means a period of three months at most. Any period beyond that gives rise to the assumption that the person’s regular place of work has changed. Since business trips are often individual trips under the direction of the employer, German companies need to provide comprehensive information and advice in order to ensure that German labour-protection provisions also cover business travellers abroad. In return, German law expects foreign companies to prepare their business travellers for their stay in Germany. In terms of residence law, this type of cross-border mobility is covered by a Schengen visa for short-term stays (see Chapter 4.1).

2.3.2 Intra-corporate transferees

Intra-corporate transfers are defined under German social security law. The term is used if an employee of a company which is domiciled in Germany is temporarily seconded to another country. It also applies to third-country nationals who are seconded to Germany for a limited period of time. Their stay can become unlimited later on. Once the employment abroad or in Germany becomes unlimited, the employees are transferred permanently to a new place of work. Provided there are no other provisions, an intra-corporate transfer is subject to the following preconditions:

- The transferee must be an employee of a foreign company abroad.
- The transferee travels to Germany on an order of his employer.
- The transferee remains an employee of the foreign company abroad.

The provisions in the Social Security Code IV (sections 4-5 SGB IV) are similar to those of the Directive 2014/66/EU.⁵ Intra-corporate transfers do not only

take place at higher management levels, but increasingly at all levels of a company. Economic literature focuses on the nuances of corporate reality and differentiates between the length of stay and the different types of contracts (table 1). Depending on the period covered by the contract, different residence-law provisions may apply. This is also true for other types of transfers (Tollenaere 2014: 239 et seq.).

Independent of residence-law issues, German social security law will affect the transfer conditions for both German and foreign companies. Pursuant to section 3 no. 1 SGB IV, all employees in Germany must pay social security contributions and can make legal claims on the social security system, independent of their national origin and the domicile of the employer. In this respect, the territorial principle applies (Eser 2003: 146). The details of the social security provisions depend on the country of origin of the employee, as there are countries with which bilateral social security agreements (SVAs) have been signed (table 2) and others for which this is not the case. The second group consists of countries whose social security levels are so different from those in Germany that (so far) no agreements have been concluded.

The host companies may have to shoulder quite a lot of work, as they need to examine whether the foreign social security claims of the transferee affect claims under German law or not (section 5 SGB IV). If they do not or if the influence is limited – for example because there is no or only a limited social security agreement with the country of origin – companies have to examine whether employees need to be integrated fully in the German social security system or whether other

entry and residence of third-country nationals in the framework of an intra-corporate transfer (European Commission 2014) says: “intra-corporate transfer’ means the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States” (Art 3(b)). The full text of the Directive is available in the Official Journal of the European Union: <http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32014L0066&from=EN> (15 Dec 2014).

5 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of

Table 1: Secondments abroad depending on length of stay

Term	Length	Domicile/right of direction	Work contract with the parent company	Minimum prerequisites under residence law
Business trip	1 day – 3 months	Third country/parent company	Remains unchanged	Visa with work permit
Project secondment (for example in the framework of a trainee programme)	6 weeks – 3 months	Third country/parent company	Remains unchanged; NachwG requires certification for stays of more than one month (A1 certification)	Visa with work permit
Secondment	3 – 12 months	Third country/parent company	Remains in place; additional secondment contract regulates work abroad	Visa with work permit
(Short to medium-term) Transfer/delegation	3 months – 3 years	Third country/Germany Parent company	Remains in place; additional secondment contract regulates work abroad	Visa with work permit; for stays of more than one year residence permit with work permit
(Medium to long-term) Transfer	2 – 5 years	Germany/host company; parent company may retain right to recall the transferee	suspended; secondment contract sets out rights and obligations of companies; contract parties: parent company, host company, employee	Residence permit with work permit
(Medium to long-term) Transfer	2 – 5 years	Germany/host company; parent company may retain right to recall the transferee	suspended; local work contract with host company; possibly ancillary agreements with parent company concerning re-entry into the parent company	Residence permit with work permit
Permanent transfer	Unlimited	Germany/host company	terminated; work contract with host company	Residence permit with work permit/EU long-term residence permit/settlement permit

Source: Own table, based on Mastmann/Stark (2005: 1850)

Table 2: Bilateral social security agreements (as of 2014)

	Health insurance	Old-age care insurance	Pension insurance	Unemployment insurance	Accident insurance
Australia			X	X	
Bosnia-Herzegovina	X		X	X	X
Brazil			X		X
Canada			X	X	
Chile			X	X	
China			X	X	
India	X		X		X
Israel			X	X	
Japan			X	X	
Korea			X	X	
Morocco*	X		X	X	X
Macedonia	X	X	X	X	X
Montenegro	X		X	X	X
Serbia	X		X	X	X
Turkey	X		X	X	X
Tunisia*	X		X		X
United States			X		

Source: Knappschaft Bahn See 2014

* Agreements with Morocco and Tunisia are limited to nationals of the signatory states. For all other agreements, nationality plays no role.

recognised, existing insurance policies offer sufficient protection. The host companies are responsible for this issue. The authorities will not act unless they have reason to suspect that the system is abused or that mandatory notifications have not taken place. In that case, the company may have to pay fines and social security contributions for the time the employee has worked in Germany.

If employees from a foreign subsidiary are to be transferred to Germany for a limited period of time, which is nevertheless relevant under residence-law provisions, the International Placement Services (Zentrale Auslands- und Fachvermittlung, ZAV) of the Federal Employment Agency should approve the transfer. This applies to

- senior employees and specialists with company-specific know-how who work for a company which is domiciled in Germany and are transferred to a branch in Germany for specific skilled work (section 4 no. 1 BeschV),

- senior employees of a German-foreign joint venture (section 4 no. 2 BeschV),
- employees who have obtained a university degree or comparable qualification and take part in a staff exchange in an international company or group of companies (section 10 sub-section 1 BeschV),
- employees of an international group of companies or group company who have obtained a qualification that is comparable to that of a German skilled worker if they are needed in Germany to prepare a project abroad (section 10 sub-section 2 BeschV).

If the staff exchange is limited to one year at most, the national visa can – in derogation of the usual period of up to 90 days (see Chapter 4.2) – be granted for the whole length of stay. Table 3 gives an overview of international staff exchange programmes by selected nationalities.

Table 3: International staff exchange programmes in 2006 – 2013

Nationality	International staff exchange pursuant to section 31 no. 1 BeschV (old version) or section 10 BeschV (new version)*							
	2006	2007	2008	2009	2010	2011	2012	2013
Brazil	250	278	238	157	197	271	190	209
China	591	740	608	472	645	795	753	796
India	1,710	2,225	2,558	2,195	3,031	3,724	4,238	4,696
Japan	187	188	173	150	127	160	151	172
Mexico	152	196	224	153	176	222	212	225
Philippines	32	62	71	50	108	130	111	116
Russian Federation	107	115	147	74	136	162	144	126
Turkey	111	105	166	137	95	116	110	117
United States	699	705	726	560	768	719	620	695
Other nationalities	944	805	744	481	649	777	704	663
Total	4,783	5,419	5,655	4,429	5,932	7,076	7,233	7,815
International staff exchange pursuant to section 31 no. 2 BeschV (old version)**								
Total (section 31 no. 2 BeschV, old version)	487	403	246	163	211	433	305	101
International staff exchange, total	5,270	5,822	5,901	4,592	6,143	7,509	7,538	7,916

Source: Bundesagentur für Arbeit 2014

* Section 31 BeschV was superseded by section 10 BeschV as of 1 July 2013

** Up to 30 June 2013. From 1 July 2013, registered pursuant to section 10 BeschV.

Special Case: Countries with which Germany has concluded service contract and guest worker agreements

Moreover, Germany has concluded bilateral agreements with some countries which deal with the entry of service contract workers and guest workers. The

entry of service contract workers is regulated by the agreements between Germany and the Republics of Bosnia-Herzegovina, Macedonia, Serbia and Turkey on the secondment and employment of workers by companies domiciled in these countries (section 29 sub-

section 1 BeschV). Guest worker agreements have been concluded with Albania, Croatia and Russia. Guest workers are persons who have completed professional training in their country of origin, who additionally have German language skills and plan to take up work in Germany for at most 18 months in order to polish their professional and language skills. The minimum age is 18, the maximum age 35 – 40. Guest workers from the countries listed above must go through the labour-market access procedure, but are exempt from the check whether German workers are available under section 29 sub-section 2 BeschV (BA 2014a).

While section 10 BeschV foresees stays of up to three years in the framework of international staff exchange programmes, the service contract agreements say that senior employees, for example, may stay for up to four years (section 29 sub-section 1 BeschV).

2.3.3 Business salesman / independent salespeople

The German Commercial Code defines the term “business salesman” in part 7. It says that business salespeople are self-employed business people who engage in brokering or concluding business contracts on behalf of another entrepreneur. Self-employed people can determine both their professional activities and their working hours for themselves (section 84 sub-section 1 HGB). This defines when a salesman can be regarded as independent: Salespeople who are not self-employed within the meaning of sub-section 1, but broker or negotiate business contracts on behalf of an entrepreneur are to be regarded as employees (section 84 sub-section 2 HGB). It is necessary to differentiate between independent salespeople and employees, who are often sales representatives or commercial agents of a company. In that case, commercial agents are not the same as free professionals (see Chapter 2.3.4).

Under the rules of the double taxation agreements, salespeople are not supposed to manage a permanent establishment in the sense mentioned below (see Chapter 5.3.3). They may have their own permanent establishment, but do not run that of a business principal. Any profits which the company that employs the salesman gains through the salesman’s efforts are taxed in Germany. If the independent salespeople are third-country nationals who live in Germany, but do

not hold a EU residence permit or a settlement permit, the provisions of section 21 AufenthG apply. Commercial agents and sales representatives of a foreign company are subject to the general visa and residence provisions. Moreover, specific provisions may apply, for example if the agent wants to act as a broker. In that case, he or she will have to obtain the relevant broker license (or a foreign equivalent which is recognised in Germany).⁶

2.3.4 Free professions / independent professionals

The term “free professions” is very broad, and the range of professions which it covers changes permanently. About 1.3 million free professionals are self-employed. They employ about three million employees, 252,000 family members and about 122,000 apprentices (BFB 2014). A definition of the free professions can be found in the German Partnership Act (Partnerschaftsgesellschaftsgesetz, PartGG), which says that members of the free professions “generally provide personal, autonomous and professionally independent services of an advanced nature in the interest of both clients and the general public on the basis of special professional qualifications or creative talent. The practice of an independent profession within the meaning of this Act shall comprise the independent professional occupations of physicians, dentists, veterinary practitioners, non-medical practitioners, physiotherapists, midwives, massage therapists, psychologists, members of bar associations, patent agents, accountants, tax consultants, consultant economists and business economists, chartered accountants (attested auditors of books), tax agents, engineers, architects, trade chemists, nautical pilots, professional independent experts, journalists, photo-journalists, interpreters, translators, and of similar professions, as well as that of academic scholars, artists, writers, teachers and educators” (section 1 sub-section 2 PartGG). Free professions are neither subject to the German Industrial Code nor do they have to pay trade taxes. Their members are subject to the Income Tax Act, which says that free professionals remain free professionals within the meaning of the Income Tax

⁶ Rights and obligations of commercial brokers are set out in part 8 HGB.

Act if they rely on the help of qualified staff, provided that they run the business on the basis of their own specialist knowledge in their own responsibility (section 18 sub-section 1 no. 1 EStG). These Acts define the so-called “listed professions”, which fall into four main categories:

1. **Medical professions:**
doctors, dentists, veterinarians, psychologists etc.
2. **Legal, tax, economic advisory professions:**
Lawyers, patent lawyers, notaries, auditors, tax advisors, accountants etc.
3. **Scientific and technical professions:**
surveyors, architects, commercial chemists etc.
4. **Cultural professions:**
journalists, interpreters, translators, artists, writers, teachers etc.

As it is impossible to list all existing free professions in the Acts mentioned above, the Acts also refer to similar professions, which are based on listed professions, but take into account the changes in the economic and professional landscape. These professions include, for example, ergotherapists, massage therapists, communication trainers, advertising copywriters, online editors and online journalists, actors and many more. As it is often difficult to differentiate clearly between free professions and commercial activities, the tax office which is responsible for the individual's place of residence may have to judge the individual case. The tax treatment depends on the general characteristics of the free professions: professionalism, service to the community and autonomy.

Many free professions require a university degree. However, this may not be sufficient. Tax advisors, for example, do not only need a degree in economics, but must also pass a tax advisor examination, which they may take only if they can prove that they have worked for at least two years in the field of tax advice. The same applies to numerous other free professions (Kay/Schneck 2012). Free professionals from third countries may be granted a residence permit pursuant to section 21 sub-section 5 AufenthG if they have already obtained the necessary permit to practise their profession or at least an assurance that this permit will be granted. For many countries of origin, for example the US, Canada, Ukraine or Israel, free professionals make up the majority of those who hold a residence permit pursuant to section 21 AufenthG (see table 6).

2.3.5 Service supplier

Services are classified on the basis of Art. 57 of the Treaty on the Functioning of the European Union (TFEU), which defines services as

- activities of an industrial character,
- activities of a commercial character,
- activities of craftsmen and
- activities of the professions

and the Directive 2006/123/EC on services in the internal market. Under German law, there is no clear definition of the terms “service”, “service provider” or “service supplier”; their use can vary depending on the different legal acts. For example, the German Civil Code contains only an indirect definition of services. It says that services are a contractual relationship between principal and agent. In the services area, service contracts and contracts to produce a work are predominant. The section on service contracts runs as follows:

“(1) By means of a service contract, a person who promises service is obliged to perform the services promised, and the other party is obliged to grant the agreed remuneration. (2) Services of any type may be the subject matter of service contracts” (Section 611 BGB).

The section on contracts to produce a work says:

“(1) By a contract to produce a work, a contractor is obliged to produce the promised work and the customer is obliged to pay the agreed remuneration. (2) The subject matter of a contract to produce a work may be either the production or alteration of a thing or another result to be achieved by work or by a service” (section 631 BGB).

This means that services contracts may cover a broad range of issues. The law covers only services provided against a remuneration. This applies also to cross-border services imports and exports (BMF 2012: 10 et seq.). The latter may be subject to sector-specific rules, for example the Posted Workers Act (Arbeitnehmer-entsendegesetz, AEntG) or the Act to Combat Illegal

Employment (Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG) (see Chapter 6).

Service providers are subject to the general entry, residence and work provisions. In addition, they may be subject to profession-specific admission restrictions, for example for trade services. Moreover, third-country nationals who are covered by the work contract agreements mentioned above may be excluded from working for municipalities, provided there are no special rules.

2.3.6 Graduate trainees

There is no definition of the term “trainee” in German law. Thus, the content and structure of trainee programmes may differ considerably. Such programmes are exclusively defined by the company which offers them in hopes to attract new employees via these temporary training schemes. Usually, trainee contracts are employment contracts which are signed for a limited period of time with the parent company abroad. They remain in effect during the trainee’s stay in Germany. Trainees who, in the framework of such a programme, are transferred to a department of their international parent company or to a partner company in Germany do not need an approval by the Federal Employment Agency, provided that their stay does not exceed three months. The law assumes that, under such circumstances, the main residence of the trainees remains abroad. Entry to Germany is subject to general visa and residence provisions and German social security standards.

3 Structural framework

The following chapter focuses on institutions which promote Germany as a business location with (potential) investors and entrepreneurs. As the German government does not actively channel investments, the chapter also gives an overview of some basic guidelines of structural policy, spatial planning and innovation promotion, as these passive instruments may create incentives to invest in certain regions and/or sectors. Existing bilateral agreements play a major role in this context, too.

3.1 Actors for attracting investors

3.1.1 Organisational framework and information policy

As the government does not intervene much in economic affairs in Germany and state institutions and economic agents have agreed on a “division of labour”, there is no single central institution which aims to attract foreign investors, just as there is no direct state channelling of investments and no restriction of investment permits to certain groups of investors.

Instead, there are several regional and national organisations which offer a broad range of services to (potential) foreign investors, from market and location analysis to the organisation of investor presentations at trade fairs or to start-up support. The Federation of German Industries (Bundesverband der Deutschen Industrie e.V., BDI), the Chambers of Industry and Commerce (IHKs) and the Chambers of Trade (HWKs) are some of the most important local agents. As entities under public-sector law, they represent their member companies and are present all across Germany. Their activities are not limited to Germany, but also include cross-border cooperation, for example in the search for technology partners. The Chambers and Associations usually do not run own financial assistance programmes. As they are responsible for limited geographical areas, there are numerous regional start-up initiatives and support measures which aim, for

example, to revive city centres, to renovate city council housing, to support start-up companies or to form corporate clusters. In principle, immigrant investors and entrepreneurs can benefit from such initiatives, too. Regional assistance can be claimed by all investors who meet the relevant conditions.

While business promotion is, in principle, a national issue, every federal state has its own agency, which works on the basis of the relevant state development plan and the coordination framework between the federal and the state governments (Bundesregierung 2014). That means that the focus of the measures can be adjusted to the local situation. The financial regimes may differ as well owing to the financial autonomy and different financial situation of the states. As business promotion is a priority issue at all levels of government, large cities and agglomerations as well as, increasingly, smaller municipalities have established their own business promotion agencies, which actively promote the cities' interests. They act as points of contact and network partners for investors, maintain close relationships with the Chambers, with representatives of the local and regional economy and with political decision makers and provide potential investors with information about options to obtain assistance for new establishments, expansion or renovation projects. The association “Deutscher Verband der Wirtschaftsförderungs- und Entwicklungsgesellschaften e.V.” (DVWE) bundles the interests of more than 130 local and regional business promotion agencies across Germany.⁷

In addition to the activities at the state, regional and local level, the federal government has implemented numerous concrete measures to promote business. The online database www.foerderdatenbank.de, which is run by the Federal Ministry for Economic Affairs

⁷ For more information on the tasks, the members and the statutes of Deutscher Verband der Wirtschaftsförderungs- und Entwicklungsgesellschaften see: <http://www.dvwe.de> (15 Dec 2014).

and Energy, gives an overview of all current support and financial assistance programmes by the federal government, the states and the EU.

The German Federal Central Tax Office (Bundeszentralamt für Steuern, BZSt), an authority in the jurisdiction of the Federal Ministry of Finance (BMF), has established a central contact point for investors which provides information on taxes and special rules for foreign investors. The internet sites

- http://www.steuerliches-info-center.de/EN/Home/home_node.html and
- www.germantaxes.de

provide all relevant tax information concerning the registration and notification obligations of foreign individuals and businesses, depending on whether the individual or the business is domiciled in Germany or abroad. Moreover, investors from third-countries can obtain reliable information on the tax treatment of the intended investments from the Office (see Chapter 5.2.1). In addition, there is also a central point of contact for foreign investors and entrepreneurs from third-countries: Germany Trade & Invest (GTAI), a consultancy in the form of a corporation fully held by the German government.

3.1.2 Germany Trade & Invest

Germany Trade & Invest is the brand name of “Gesellschaft für Außenwirtschaft und Standortmarketing mbH”, which comes under the jurisdiction of the Federal Ministry for Economic Affairs and Energy and has its seat in Berlin. The agency has several instruments to promote business at its disposal. Its main task is to promote Germany as a business location abroad and make it easier for potential investors and entrepreneurs to access the German market by providing them with information on customs and tariffs, on Germany as a business location and on support options. On behalf of the ministry, the agency runs the business portal www.ixpos.de in German and English, which also contains market news and news on recent political and legal developments. As a network partner, it is in close contact with the most important agents in the German economy, for example:

- All federal ministries,

- lower-ranking authorities, such as the Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA),
- state ministries,
- delegation and representative offices of the German economy,
- Chambers of Commerce Abroad (AHKs),⁸
- Chambers of Industry and Commerce,
- Chambers of Trade,
- associations and institutions at the federal level such as BDI,
- state associations of the German economy,
- Reconstruction Loan Corporation (Kreditanstalt für Wiederaufbau (KfW),
- German Energy Agency (Deutsche Energie-Agentur, dena),
- German Agency for International Cooperation (Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ).

In addition, the agency runs roughly 50 offices around the world, which serve as a first point of contact for foreign investors and entrepreneurs and provide German companies and investors with information about gaining access to foreign markets. The agency aims, in close cooperation with the Chambers of Commerce Abroad and the German embassies, to promote bilateral trade, to generate wealth and revenues for the state and to create jobs.

8 The German Chambers of Commerce Abroad are voluntary associations of German and foreign partner enterprises. They have close links to the Chambers of Industry and Commerce and members of a joint organization under the roof of the Association of German Chambers of Commerce and Industry (Deutscher Industrie- und Handelskammertag, DIHK) (Deutscher Industrie- und Handelskammertag 2014). For more information see www.DEinternational.de (15 Dec 2014).

3.2 Objectives of German support policy

While the German government does not directly channel investments, there is a range of indirect incentives which aim to direct capital to certain target regions or to certain innovative sectors of the economy. Foreign investors and entrepreneurs may take advantage of these measures (which often involve subsidies), provided they meet the necessary requirements.

3.2.1 Structural support

The German Spatial Planning Act (Raumordnungsgesetz, ROG) and the Act on the joint scheme for “improving regional economic structures” (Gesetz über die Gemeinschaftsaufgabe “Verbesserung der regionalen Wirtschaftsstruktur”, GRWG) include provisions on the necessary tasks to create equivalent living conditions throughout Germany. This demand is set out in the Basic Law (Art. 72 sub-section 2 GG) and forms the basis for the spatial plans of the federal states. Section 3 GRWG, a key instrument for promoting small and medium-sized companies in structurally weak regions, says that it is possible to grant subsidies, loans and guarantees for investments. This rule provides the federal government, the states and the cities with a useful instrument to offer financial incentives to potential investors. The amount of the financial assistance can vary depending on the region, the economic sector, the size of the company and the type of investment.

The state development plans offer both short-term investment opportunities – for example in the framework of time-limited economic support programmes of the federal government – and guidelines for medium to long-term structural development policies. As a result, the areas which receive support and the financial assistance for investments and business start-ups differ within Germany and even within the individual states. The federal government and the states have established a so-called “coordination framework”, which defines the areas to be promoted and the periods for which assistance is granted. The volume of the financial support depends on the regional needs, which are determined on the basis of an overall indicator consisting of the following, differently weighted sub-indicators:

- Average unemployment rate, 2009 – 2012 (45 %)
- Average annual wage per employee liable to social security contributions, 2010 (40 %)
- Expected number of gainfully employed persons, 2011 – 2018 (7.5 %)
- Infrastructure indicator (as of 30 September 2012) (7.5 %)

These indicators are used to define areas eligible for regional aid (“C” and “D” areas), as classified in the “Guidelines on regional State aid for 2014 – 2020” of the EC, where investors can apply for the relevant subsidies, for example for establishing a new business (see Chapter 5.2). For example, apart from Leipzig, new enterprises in the five new German states can claim the maximum subsidies of 35%, 25% and 15% for small, medium-sized and large companies, respectively, until 31 December 2017, with special conditions (see chart 3) in place for the structurally weak area near the German-Polish border (Bundesregierung 2014: 9 et seq.⁹).

9 This document does not only describe the EU criteria for the distinction between small, medium and large companies (number of employees and sales and balance-sheet volume) (p. 12), but also exclusion criteria and criteria which result in a cap on aid (p. 11).

Chart 3: Improvement of the regional economic structure (GRW): Assisted areas 2014 – 2020

Karte einfügen

This administrative framework is accompanied by the Federal Institute for Research on Building, Urban Affairs and Spatial Development (BBSR) within the Federal Office for Building and Regional Planning (BBR), which advises the European Commission as well as the federal and state governments. The Institute conducts own research studies to evaluate current activities and identify new fields of action and thus to help set priorities in spatial planning and, consequently, infrastructure and support policies. German spatial planning focuses on supporting commercial investment and investment in local and business infrastructure, in particular

- small and medium-sized enterprises (SME),
- technology and innovation and
- rural/structurally weak areas.

Spatial and infrastructure policy aims at offsetting competitive disadvantages of individual regions and has thus become an important planning instrument in the investment and economic decisions of both German and foreign investors and entrepreneurs. Structural support for investments can be combined with other operative support programmes, for example research and development (R&D) support (in the form of grants, loans, guarantees or shares) or subsidies for employee training. Foreign investors can, in effect, claim state support to train their workforce or subsidies if they take on long-term unemployed. The local office of the Federal Employment Agency will help them to do so.

3.2.2 Promotion of innovation

As in structural policy, there is also a well-based division of labour in the area of innovation promotion. This means that there is not one, but many agents at all political levels who try and attract foreign investors' funds for research and development purposes. As it is the German states which are responsible for cultural issues, the promotion of innovation and the identification of different foci rests largely with the individual states, which run the majority of the tertiary education institutions. Due to their legally guaranteed autonomy, universities and other institutions of higher education

may conclude international cooperation agreements in their own name (Mayer et al. 2012).¹⁰

Universities, Universities of Applied Sciences and the independent research institutions (Fraunhofer-Gesellschaft, Helmholtz Association, Leibniz Association, Max Planck Society etc.) thus raise a large share of investor funds themselves. Foreign investors are usually welcome partners for research and development work and may formulate specific research orders. These activities are subject to the general legal provisions, including exceptions, for example in the area of armament research.

While research orders may be handed out in every field, within the bounds of the relevant agreement, there are some research areas which get particular attention because the results are particularly interesting from a commercial vantage point and may help to ensure Germany's future competitiveness. These key technologies include:

- Biotechnology, bioeconomics
- Nanotechnology
- Photonics
- New materials (light materials, intelligent materials etc.)
- New production methods (efficiency improvements etc.)

Alongside the education and research institutions, the state governments themselves run innovation promotion activities. They have the usual means (grants, loans, guarantees and interests) at their disposal,¹¹ with the proviso that cross-border projects may be supported only if a German project partner is involved.

¹⁰ German universities may conclude agreements with their counterparts from other countries, and so can individual faculties in order to channel investments directly into a specific project.

¹¹ For state-specific information see the following website, which also includes links to other sites: <http://www.foerderinfo.bund.de/de/laender-123.php> (15 Dec 2014).

Alongside the state governments, the federal government also pursues a strategy to ensure the medium and long-term viability of Germany as a business location. The latest “High-tech Strategy” (HTS) aims to strengthen prosperity and growth by shortening the time between the identification of new research results and their use in new products (BMBF 2014b). Creative ideas are to lead to concrete innovation. The HTS focuses on the following areas:

- Digital economy and society
- Sustainable growth and energy
- Innovative labour
- Healthy life
- Intelligent mobility
- Civil security

The broad political guidelines, which aim explicitly at promoting cross-border cooperation, are supplemented by specific promotion programmes (BMBF 2014a). For example, the Federal Ministry for Economic Affairs and Energy has launched a specific innovation programme for small and medium-sized enterprises (SMEs) which is closely linked to structural policy. The “Central Innovation Programme SME” (Zentrales Innovationsprogramm Mittelstand, ZIM) aims to promote SMEs and give them an incentive to invest in research and develop their innovation capacities. Moreover, the programme aims to promote knowledge and experience sharing between businesses and research institutions and thus to strengthen the idea of cooperation and networking. The programme supports individual projects, cooperation projects and cooperation networks, which may include partners from abroad. In the framework of such network initiatives, foreign partners may invest in German SMEs, or else research and business cooperations in the investor’s country of origin may be supported.

The ZIM is administered and supported by AiF Projekt GmbH, a full subsidiary of the German Federation of Industrial Research Associations “Otto von Guericke” e.V. and a project leader empowered¹² by BMWi. This

12 The Federal Republic of Germany, represented by the

GmbH runs the information portal www.ira-sme.de, which aims to coordinate and improve international innovation cooperation between different companies and research institutions. Just like GTAI, this agency, too, is responsible for establishing contacts. It advises SMEs on existing assistance options, accepts applications for support, determines whether the projects are eligible for support and – if they are indeed eligible – pays out the funds. Moreover, it is not only a point of contact for companies and research institutions in Germany which want to engage in international co-operations, but also maintains contacts with partner institutions in third countries in order to support an exchange of innovation, which is often based on the EUREKA research initiative processes.¹³ Outside the EU and the EEA, Israel, Canada, Russia, South Africa, South Korea, Turkey, Ukraine and Vietnam are ZIM partners, with which bilateral investment agreements have been signed.

3.3 Bilateral agreements

Bilateral agreements play an important role in the investor acquisition process. For example, they help to reassure investors that they will not have to pay double taxes. So-called double taxation agreements are an efficient instrument to make Germany attractive for foreign investors.

3.3.1 Agreements on investment promotion and investment protection

Germany has signed bilateral investment treaties (BITs) with numerous countries in order to promote capital transfer and ensure mutual protection of capital investments (Ceyssens/Sekler 2005: 25). So far, bilateral agreements have been concluded with 129 countries. These agreements, which guarantee international protection, aim to create favourable investment conditions for both partners.¹⁴ Both sides commit

Ministry for Economic Affairs and Energy, has empowered the company to act as laid down under public law and allocate grants as a fiduciary of the government pursuant to the Federal Budget Code (Bundeshaushaltsordnung, BHO; section 44 sub-section 3 BHO).

13 EUREKA is the label of the European network for market-oriented research and development.

14 The Federal Ministry for Economic Affairs and Energy (2014c) provides a list with all bilateral agreements in force under: <http://www.bmwi.de/BMWi/Redaktion/>

themselves to treat investments by the partner in the same way as those by domestic investors or investors from other countries. Under these agreements, foreign investors from the relevant countries can invest in Germany. They are subject to the general conditions and to the exceptions set out in the Foreign Trade and Payments Act and the Foreign Trade and Payments Ordinance as well as to the possibly necessary reporting requirements for capital investments. The BITs also make sure that the treatment does not affect prerogatives granted to a third country which, alongside one of the agreement partners, is a member of a tariff or economic union, a common market or a free-trade area or associated to this union, market or area (Art. 3 sub-section 3 BIT).¹⁵ These agreements, which are concluded at the government level, form the basis for investment protection guarantees of the state.¹⁶

The bilateral investment agreements use a broad definition of the term “investor”, which applies to both natural persons (i.e. Germans within the meaning of the Basic Law) and legal persons. This refers to entrepreneurs, too. The natural and legal persons of the partner country may act as entrepreneurs in Germany on the basis of the general legal rules. There are no mutual most favoured nation clauses in these agreements, as such provisions would discriminate against other parties. BITs usually do not include specific clauses on mobility rules.

3.3.2 Agreements on avoiding double taxation

In addition, numerous bilateral agreements have been concluded with countries in order to prevent or at least reduce double taxation for investors and companies which, as natural or legal persons, register revenues in both countries. These agreements are legally binding and thus outrank the national taxation laws pursuant to the German Fiscal Code (section 2 of

the German Fiscal Code (Abgabenordnung, AO)). These agreements are often simply called “double taxation agreements” and often include provisions for mutual administrative support and cross-border exchange of information.

Pursuant to section 1 sub-section 1 of the German Income Tax Act (Einkommenssteuergesetz, EStG), all persons who are domiciled or have their usual residence in Germany are also subject to tax in Germany. The tax is calculated according to the country of domicile and the principle of world-wide income. This means that an individual who is resident or domiciled in Germany has to pay tax on all income in Germany, regardless of where the income is generated. Under double-taxation agreements, taxpayers may offset any taxes paid abroad – for example on rent income or corporate profits generated and taxed abroad – against their tax debt in Germany.

Individuals who are not resident or domiciled in Germany are subject to the withholding and territory principle under income tax law. That means that investors or entrepreneurs domiciled abroad only pay taxes under German tax rules on income they have actually generated in Germany (for example rent income, corporate profits or profits from the sale of licences). Any tax paid in Germany may be offset against the tax debt in their country of residence or domicile.

Legal persons are subject to the same offsetting mechanism (section 26 of the Capital Tax Act (Körperschaftsteuergesetz, KStG)), as corporations are not to be treated less favourably than individuals. Pursuant to the KStG, corporations, in particular European corporations, public limited companies (AGs), partnerships limited by shares (KGaAs), limited liability companies (GmbHs) and cooperatives are subject to unlimited taxation (section 1 sub-section 1 KStG).

PDF/B/bilaterale-investitionsfoerderungs-und-schutz-vertraege-IFV,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf (15 Dec 2014).

15 For a template see Ceysens/Sekler 2014: 132-137.

16 Since many countries are situated in risky areas of the world, some agreements include additional clauses which may, for example, set out a liability cap. Please see the website of the department for external trade guarantees within the Federal Ministry for Economic Affairs and Energy for a list with these exceptions: <http://www.agaportal.de/en/dia/deckungspraxis/laenderdeckungspraxis.html> (15 Dec 2014).

4 Residence regulations

Investing as such, for example purchasing a property, acquiring shares in a company or renting a production site, does not entitle investors to a residence title. If the investment project requires the investor's presence in Germany, for example because they plan to run a newly established corporation, they will need to apply for a residence title.

Depending on the type of the enterprise and the probable range of tasks, investors and entrepreneurs will need a residence permit which enables them to earn their living as an employee or as a self-employed person. For details see the Residence Act. Family reunification, access of the investor's spouse to the German labour market and potential access to social security benefits are issues which will depend on the investor's obtaining a residence permit. Many investing activities, however, do not require a longer-term residence title, as the necessary tasks can be completed during a short stay in the country under a Schengen visa, if the investor does indeed need to travel to Germany for a limited amount of time. In that case, investors enter the country pursuant to the Schengen Borders Code Regulation (EC) 562/2006. They will have to give information about the purpose of their stay and provide the required income and wealth guarantees and proof of medical insurance (Visa Code Regulation (EC) no. 810/2009).

Unlike in the case of investors, a longer-term residency status is a necessary prerequisite for entrepreneurs and self-employed people.

4.1 Schengen visa (for short-term stays)

In principle, third-country nationals need a residence title and a valid passport or passport substitute to enter and stay in Germany (sections 3 and 4 of the Residence Act). The residence title requirement does not apply to nationals of those countries for which the

European Union has waived the visa requirement for short stays and visits amounting to up to 90 days per half year (of 180 days) (Art. 1 (2) Visa Regulation). In principle, the Schengen or "business visa" needs to be obtained from the responsible embassy before entering Germany. Table 4 gives an overview of the number of visas granted for business purposes in 2013.

Table 4: Visa by purpose of the stay (2013)

	Validity	Total number of visa	of which for business purposes
C-Visa	up to 90 days	1,539,620	542,224
C-Visa	up to 1 year	286,035	126,045

Source: Deutscher Bundestag 2014

If a visa is required, the Schengen visa is an important instrument in the framework of economic and business mobility, as it enables (potential) investors, entrepreneurs and business travellers from third countries to establish business contacts, participate in industrial and trade fairs or examine the location and the conditions for investments, which may take place at a later stage. A Schengen visa is usually sufficient for meeting business partners and signing a contract in Germany, as long as investors do not need to remain in the country for a longer period of time (for example as project controller or employee). If they want to work and stay in Germany for a longer period of time, they will have to apply for a national visa (Parusel/Schneider 2011).

For self-employed third-country nationals, Schengen visa only play a role if foreign self-employed persons want to travel to Germany, for example in order to monitor the business activities of a representative office or permanent establishment of their company in Germany. The application, examination and granting procedure for a Schengen visa is subject to the same provisions as that for a business visa for investors.

4.2 National visa (for long-term stays)

For a longer-term stay in Germany, foreigners have to obtain a national visa from the responsible embassy before entering the country. The national visa is usually valid for a period of up to 90 days,¹⁷ while the preconditions depend on the purpose of the stay. Visa procedures for self-employed workers are not fundamentally different from those for investors in terms of information and documents to be provided.

However, as self-employed persons tend to stay for a longer period of time, one particular feature may make the procedure more complicated. If a foreigner wants to take up a self-employed activity pursuant to section 21 AufenthG, the foreigners' authority for the future residence and workplace has to agree to the granting of the visa (section 31 sub-section 1 no. 2a AufenthV). Persons who want to travel to Germany in order to establish an enterprise may have to present an invitation by the German business partner for their visa application (GTAI 2012: 10 et seq.).

In 2013, 582 national visa were granted to self-employed and freelance persons and 400 others to managers who, in some cases, did work similar to that of self-employed persons (see Chapter 5.3) (Deutscher Bundestag 2014: 43). There are no figures on how many investors enter Germany with a D-Visa, as investment activity is not registered as a separate purpose in the statistics.

4.3 Residence permit

If a third-country national wants to establish a company in Germany, he or she is required to live permanently in the country. Foreigners who are already living in Germany need to apply for the necessary residence permit pursuant to section 21 AufenthG to the foreigners' authority which is responsible for their place of residence. The same applies if the foreigners already hold a residence title for another purpose. In that case, they may be allowed to pursue self-employment beyond the initial purpose of stay. Table 5 shows how many skilled workers have entered the country during the past five years.

Third-country nationals who are not yet living in Germany, but have decided to take up a self-employed activity may apply to the visa departments of German embassies to have their business plans examined and approved before they enter the country (section 31 sub-section 3 AufenthV). This application will be sent on to the Federal Foreign Office and ultimately to the foreigners' authority which is responsible for the future place of residence. However, the prerequisites set out in section 21 AufenthG must be met. Applicants must apply in person at the embassy and provide the following documents (see Chapter 5.2) in addition to the usual documents (application form, photograph, passport etc.):

Table 5: Immigration by skilled workers, 2009 – 2013 (entry in the reporting year)

Migration for work purposes pursuant to	2009	2010	2011	2012	2013
section 18 sub-section 4 AufenthG (skilled foreigners)	14,816	17,889	23,912	23,191	17,185
section 19 AufenthG (highly skilled foreigners)	169	219	370	244	27
section 19a AufenthG (EU Blue Card)	-	-	-	2,190	4,651
section 20 AufenthG (research)		211	317	366	444
section 21 AufenthG (self-employment)	1,024	1,040	1,347	1,358	1,690
Total	16,149	19,359	25,946	27,349	23,997

Source: Central Aliens Register, BAMF 2014.

¹⁷ There are several exemptions, for example for residence titles granted pursuant to section 18c AufenthG for the purpose of seeking employment. In this case, the visa is granted for six months.

- Business concept,
- business plan,
- business profile,
- capital requirement plan,
- investment plan,
- cash-flow plan,
- profitability forecast,
- proof of medical insurance,
- if they are above 45 years of age, proof of sufficient old-age provision.

Moreover, the German Trade Code (Gewerbeordnung, GewO) requires German nationals in certain professions to obtain a professional liability insurance. Pursuant to section 13a sub-section 5 GewO, this requirement also applies to business people and service providers from other EU member states and signatory states to the Agreement on the EEA. Third-country nationals are subject to the rules for the professions listed in the GewO as soon as they are granted the necessary residence title to pursue a profession and their business is registered.

The German foreigners' authorities will contact the Chambers of Industry and Commerce, which are responsible for the specialist examination, and ask them for an opinion on the applicant's plans. Other institutions, such as the Chamber of Architects, the Chambers of Trade, the healthcare authorities or the state Chambers of Doctors, may be consulted for specific professions, if necessary. Other professional organisations may be consulted as well for the relevant professions. In order to determine the actual professional needs in a region, a city or municipality, the Chambers may, in turn, consult local representatives, for example local economic promoters.

The formal and professional situation of the applicant is a key criterion during the examination, as almost all professions require applicants to provide proof of their skills. This applies both to freelance professions (see Chapter 2.3.4) and trade, which has its own qual-

ity benchmarks. Pursuant to section 1 sub-section 1 in conjunction with section 7 sub-section 1a HwO, only masters of their trade or professionals with an equivalent qualification may manage a trade business. Those who want to establish a restricted trade business need to have their business entered in the skilled trade register with the Chamber of Trade. If the entrepreneurs themselves do not hold the necessary qualification, they may employ a business manager who does. In that case, the business may be called a "Meisterbetrieb" (business led by a master). These formal criteria may – and this does not apply only to free professions and trade professions – make it difficult to recognise foreign professional qualifications, even though the new Employment Ordinance (Beschäftigungsverordnung, BeschV) foresees a liberal recognition practice (for example, an applicant's qualifications can be recognised if he or she can prove that he or she has worked for several years in his or her profession). If certain qualifications are not regarded as equivalent due to "gaps" during the training, applicants can (and, in fact, must before they begin to work in their chosen profession) take part in a supplementary course or pass an examination to obtain the relevant qualification in cooperation with the responsible Chambers (section 11 of the Professional Qualifications Assessment Act (Berufsqualifikationsfeststellungsgesetz, BQFG)).

During the procedure, the authorities also examine whether the applicants' past acts raise doubts about their reliability. This may be the case if, for example, they have been found guilty of tax offences.

Beyond the formal requirements, the Chambers generally have a lot of leeway in assessing the business plans. For example, they may approve plans to establish a company in a particular market segment even other companies are already active in this segment, as they can argue that a new player will help to "intensify competition". The key question is whether a city or region is more than sufficiently or insufficiently provided with certain services or goods (IHK Berlin 2014: 11).

When granting a residence permit which permits its holder to take up a self-employed activity, the foreigners' authority is not bound by the recommendations and assessments of external specialists. Such recommendations have only an advisory character, and the applicant is not informed of their content in any way.

If the foreigners' authority approves the applicant's business plans, it will grant a residence permit for a period of one to three years. This residence permit may be prolonged if the business activity during this time is judged favourably. If, during this period, the applicant claims social-security benefits pursuant to the Social Code (Sozialgesetzbuch, SGB) Book II or XII – for example because the enterprise failed during

the time of residence – an application for an extension of the residence permit may be rejected. An extension of the residence permit will be subject to the same regulations as apply to issuance (section 8 sub-section 1 AufenthG).

Table 6 gives an overview of the countries of origin of the largest groups of self-employed persons.

Table 6: Immigrants issued a residence permit pursuant to section 21 AufenthG

Nationality	2009	2010	2011	2012	2013	
					of which self-employed	
United States	337	384	512	540	621	559
China	133	85	120	125	152	14
Australia	59	53	74	77	134	92
Canada	37	74	72	78	102	97
Russian Federation	59	77	77	100	77	26
Ukraine	71	88	89	72	77	59
Japan	30	32	50	57	62	52
Israel	19	38	30	45	57	55
Turkey	13	20	26	19	33	7
Republic of Korea	11	16	21	25	31	10
New Zealand	15	9	29	20	26	23
Iran	17	27	35	30	24	4
Other	223	137	212	170	294	203
Total	1,024	1,040	1,347	1,358	1,690	1,201

Source: Central Aliens Register, BAMF 2014.

4.4 Settlement permit

The settlement permit is an unlimited residence title which entitles its holder to pursue an economic activity without any restrictions. Pursuant to section 9 AufenthG, a third-country national “shall be granted a settlement permit if he or she

1. has held a residence permit for five years,
2. his or her subsistence is secure and
3. he or she has paid compulsory or voluntary contributions into the statutory pension scheme for at least 60 months or furnishes evidence of an entitlement to comparable benefits from an insurance or pension scheme or from an insurance company”.

In derogation of these prerequisites, the Residence Act includes numerous exemptions, for example for re-

searchers and self-employed people. Persons who hold a residence title which entitles them to pursue a self-employed activity may be granted a settlement permit after three years (section 21 sub-section 4 AufenthG) if they have successfully carried out their plans and if their subsistence and that of the dependants living with them as a family unit and whom they are required to support is secure.

4.5 Family reunification

Residence for family reasons is regulated in part 6 of the Residence Act (sections 27 – 36 AufenthG). Spouses of foreigners who hold a settlement permit, a long-term residence permit (EU residence permit, EU Blue Card) or a residence permit are usually allowed to enter Germany, provided there are no doubts about the validity of the marriage, their subsistence is

secure, both partners are at least 18 years old and the spouse has at least a basic knowledge of German. The language requirement may be waived, for example for spouses of EU Blue Card holders (section 30 sub-section 1 sentence 3 no. 5 AufenthG). For family members, this residence title entitles the spouse to pursue an economic activity in Germany (section 27 sub-section 5 AufenthG).

Independent of age and language knowledge, the spouse will be granted a residence permit if

1. the foreigner who joins in Germany holds a residence title as a highly qualified person (section 19 AufenthG), an EU Blue Card (section 19a AufenthG), as a researcher (section 20 AufenthG) or self-employed entrepreneur (section 21 AufenthG) and the “marriage already existed at the time when the foreigner established his or her main ordinary residence in the federal territory”, or
2. “the foreigner held a residence permit pursuant to Section 20 immediately before a settlement permit or an EU long-term residence permit was issued”, or
3. the foreigner holds a residence permit pursuant to section 38a AufenthG and “the marriage already existed in the Member State of the European Union in which the foreigner has the status of a long-term resident” (section 30 sub-section 1 sentence 2 nos. 1 – 3 AufenthG).

5 Foundations for starting up

According to the KfW Gründungsmonitor (Start-up Monitor), about 868,000 persons decided to become self-employed in 2013. About 186,000 of them were immigrants,¹⁸ with half of them coming from the other 27 EU member states. For years now, a high percentage of start-up entrepreneurs, i.e. about 20%, are immigrants.¹⁹ The percentage of new entrepreneurs is a bit higher in this group than among Germans (table 7), even though it is difficult to define the dividing line between entrepreneurs and investors, as a “start-up” may involve the establishment of a new company as

well as the continuation of or an investment in an existing business. Both Germans and immigrants tend to found new businesses (Metzger 2014b: 3). Many of the start-up entrepreneurs were unemployed or did not pursue an economic activity before they set up their business. They went to school, attended another professional or university training scheme or were homemakers (Metzger 2014a: 11 et seq.).

Table 7: New entrepreneurs in Germany

	All new entrepreneurs		Immigrants	
	2012	2013	2012	2013
Number of new entrepreneurs (in '000)	775	868	148	186
Entrepreneurship rate	1.50	1.67	1.60	1.98
Entrepreneurs (in %) ...				
... full-time entrepreneurs	41	35	41	40
... sideline entrepreneurs	59	65	59	60
... previously unemployed	13	14	17	20
... previously not pursuing an economic activity	20	27	20	33
... no vocational qualifications	16	23	29	44
... university degree	28	29	29	27
... aged up to 30 years	31	37	35	48
... aged above 50	17	15	4	7

Source: KfW Gründungsmonitor 2014

18 According to the Gründungsmonitor definition, immigrants are those persons who are not German citizens. The Monitor does not distinguish between persons who have just entered the country and third-country nationals who are already resident in Germany.

19 The study by Hanganu et al. (2014) shows that numerous Romanians and Bulgarians established small enterprises in 2013 which were removed from the trade registers during the first half of 2014, i.e. once the free movement of workers for these groups was introduced. This phenomenon also took place in 2011, when nationals of the eight central and eastern European states were granted free movement of workers.

In principle, every person who is capable of entering into legal transactions can found a business. While immigrants tend to start their businesses earlier in life than Germans (table 7), many of them – about 50 % – have been employed before and thus acquired the professional knowledge and capacities which are necessary to succeed as an entrepreneur. Third-country nationals have several options to pursue an economic activity, which may lead to entrepreneurship later on. Professional experience obviously plays a major role in becoming a successful entrepreneur who runs a profitable company. It may be even be key for obtaining a residence title.

5.1 Occupational qualification and change of status

Besides holders of a residence permit for the purpose of self-employment pursuant to Section 21 AufenthG, third-country nationals who have been granted a residence permit for another purpose are permitted to pursue self-employment if “the permits required under other provisions have been issued or an undertaking has been provided that such permits will be issued” (Section 21 sub-section 6 AufenthG). Graduates of German universities and researchers who hold a residence permit pursuant to Sections 18 or 20 AufenthG are permitted to work as self-employed persons even if the conditions set out in Section 21 sub-section 1 AufenthG are not met, provided that the envisaged self-employment demonstrates “a connection to the knowledge acquired during the higher education studies or the research or scientific activities” (Section 21 sub-section 2a AufenthG). These provision aims at keeping highly qualified and usually young people and their professional knowledge, which they have obtained completely or in part in Germany, in the country.

Apart from retaining graduates and young professionals who have already obtained a residence permit for Germany, there have been numerous new legal rules in this area which aim to make Germany more attractive to highly qualified people (Mayer 2013). One of these measures is the so-called “Recognition Act”²⁰ of 1 April

2012, which makes it easier to recognise foreign professional qualifications and thus to integrate foreign professionals in the labour market (Griesbeck 2014: 181). In addition, the new Employment Ordinance, which entered into force on 1 July 2013, abolished the distinction between third-country nationals who already live in Germany and those who have recently entered the country. This provision opened the German labour market to third-country nationals who have had at least two years of professional training abroad (Section 6 sub-section 2 in conjunction with sub-section 1 sentence 2 BeschV). These provisions aim to streamline administrative procedures and increase incentives for foreign professionals to work in Germany.

The prerequisites for obtaining a residence permit for employment purposes are set out in Sections 18, 18a, 19a and 20 AufenthG; holders of a residence permit may, in principle, take up self-employment later and have their status changed accordingly, provided that the necessary conditions are met. Section 18c AufenthG is a relatively new instrument; it says that qualified professionals who hold a German, a recognised or otherwise comparable foreign university degree may be granted a residence permit for up to six months. This residence permit does not entitle them to work, but it enables them to seek a job in Germany. With the introduction of this permit, a decades-old principle was abolished: the residence permit is no longer linked to a concrete job offer. However, applicants for a residence permit pursuant to Section 18c AufenthG must prove that their subsistence is secure. If this condition is met, qualified professionals can organise the time-consuming preparations (see Chapter 5.2) and file the necessary applications for self-employment in Germany while holding a residence permit for the purpose of seeking a job pursuant to Section 18c AufenthG and apply for a residence permit for self-employment pursuant to Section 21 AufenthG later on. Holders of an EU Blue Card pursuant to Section 19a AufenthG may also pursue founding activities. If these activities result in self-employment, they will need to apply for a change in the residence permit to the responsible foreigners’ authority.

Table 8 gives an overview of the residence and settlement permits granted in 2013 broken down by the purpose of the stay for all relevant professional and employment groups.

20 The “Assessment and Recognition of Foreign Professional Qualifications Act”, which amended the Professional Qualifications Assessment Act (BQFG).

Table 8: Residence permits by country of origin and purpose of stay (entry in 2013)

Nationality	Residence permit				Settlement permit
	University studies	Language course, school attendance	Other educational purpose	Gainful employment*	Total
Russian Federation	1,954	266	134	1,552	257
Serbia (incl. Montenegro)	186	26	59	2,075	171
Turkey	1,465	98	133	1,307	2,362
China	8,188	447	373	3,095	57
Syria	622	80	55	165	20
United States	3,648	881	523	4,674	123
India	3,312	49	284	4,376	34
Bosnia-Herzegovina	128	35	117	2,971	122
Macedonia	85	14	24	240	63
Kosovo	54	21	69	138	86
Afghanistan	53	2	32	7	27
Pakistan	920	3	17	100	37
Iran	1,022	12	35	324	50
Ukraine	884	92	95	1,304	131
Other	19,685	3,771	1,965	11,293	1,179
Total: non-EU nationals	42,206	5,797	3,915	33,621	4,719

Source: Central Aliens Register, BAMF 2014.

* The “Gainful employment” category covers all persons who were granted a residence permit pursuant to Section 18 AufenthG, including EU Blue Card holders (Section 19a AufenthG), researchers (Section 20 AufenthG) and self-employed (Section 21 AufenthG).

5.2 Basic principles of founding an enterprise

In order to obtain a residence permit for the purpose of self-employment pursuant to Section 21 AufenthG, applicants need to file documents which give an overview of the business idea with the competent foreigners’ authority or embassy abroad. These documents will be sent on to the competent Chambers of Industry and Commerce. Future entrepreneurs will need to put their plans on a reliable and well-thought-out basis; however, future entrepreneurs from third countries have to make the strategic and logistic planning efforts as their German counterparts. The only factors which may be different are residence-law requirements and potential language barriers.

5.2.1 Preliminary work

Business concept, business plan and business profile

There are no general rules for the preparation of a business plan; its format and content depend on the

company type, with a small business usually requiring less detailed information than a private limited company (GmbH) or a corporation. The following list only focuses the core questions which the applicants should answer to convince the competent authorities of the solidity of their business concept and the sustainability of their idea. The questions are based on a list compiled by Kreditanstalt für Wiederaufbau, a state-owned promotional bank, mainly responsible for start-up financing, which is supervised by the Federal Ministry of Finance (BMF) and which asks the following questions:

1. Business idea – “Management summary”

What is the entrepreneur’s business idea, and which products and/or services do they intend to offer? What value-added does the product offer? Is the product or service relatively well-known or not? Which service does the entrepreneur offer and in what way are their services different from those of other entrepreneurs in the market? Why should people buy the entrepreneur’s product or service?

2. Personal qualification

Which education and vocational training has the entrepreneur received? Which knowledge and/or expertise do they have to manage a business? Is their professional knowledge sufficient to survive on the market? What are their commercial capacities? What are their financial liabilities? What about the entrepreneur's health? Are they covered by adequate medical insurance? Can entrepreneurs rely on business or family partners to support the establishment of the new business?

3. Market assessment

Which clientele does the entrepreneur want to address? Does the entrepreneur know what their (potential) customers want? What is the target group's market volume? Is there a risk that the entrepreneur is being dependent on a small number of large customers? How can the entrepreneur reach the target group? How expensive are marketing activities? Has the entrepreneur already made contact with potential customers? Does the entrepreneur know benchmark figures for his market or market segment?

4. Competitive situation

Is the entrepreneur the only provider in a new market or a new entrant in an existing market? Who are their competitors? Which services are offered at which prices? Are there any niches in the market? Are competitors better qualified to meet certain customer demands? How can the entrepreneur offer customers more or better value-added?

5. Input factors for production and/or services

How are operational procedures (procuring, production, sales) to be structured? Which materials, machinery and equipment are needed to start production or provide the range of services to be offered? Which infrastructure and which methods are needed to sell the product or the service? How can the entrepreneur ensure that the inventory is sufficient? Which employees with which qualifications are needed at what time? Which services can be procured from suppliers?

6. Location

Which (infrastructure) requirements does the location need to meet? Is the link to the transport network good? Does the future entrepreneur know

such locations? What is the number of potential customers in the area around the location?

7. Outlook – opportunities and risks

Which goals has the entrepreneur set for the company? How does he or she plan to reach these goals? How will the sector as a whole develop? How will demand for the entrepreneur's products evolve? Does the entrepreneur expect more competition in the coming years? How can the entrepreneur respond to negative developments on the market and in demand? Are there comparable sectors, which might provide an idea of how things might develop?

8. Legal and insurance aspects

Which legal form is the enterprise to take, and which corporate structure is intended? Who is responsible for which functions in the enterprise, if there is more than one partner? Which permits need to be obtained before the enterprise can start to work? Which specific conditions need to be complied with before the enterprise can start to work? How much space is needed, and what is the usual price on the market? Which insurance does the enterprise need, and how does the entrepreneur plan to provide for his or her family? How does the entrepreneur provide for old age?

It may be that not all of these questions are necessarily relevant. In addition, the answers to many of them are subject to forecasting uncertainties, as it is evidently impossible to fully foresee market movements or changes in the political or economic environment. However, both Germans and third-country nationals will have to extensively prepare the launch of a new business and provide at least a medium-term outlook, particularly in financial matters.

Capital requirements and investment plans

In addition to the business plan, an investment plan (table 9) is necessary. During the approval procedure, this plan must be presented for examination to the local foreigners' authority or the German embassy. It deals with the investments which should or must be made to start the business. As investments require capital, entrepreneurs need to prove to the competent authorities that they have sufficient own or debt capital at their disposal. A binding loan commitment is sufficient.

Table 9: Example of an investment plan

Planned investments	Costs (in euros)
Real estate purchases (properties, buildings)	-
Commercial building expenses	-
Machinery & equipment	-
Office furniture and equipment	-
Vehicles	-
Purchase of shares in the business	-
One-off patent/license/franchise fees	-
Inventory	-
Market entry costs <ul style="list-style-type: none"> • Costs for external advice • Costs for participating in fairs 	-
Subtotal investments (calculation basis for investment loans by KfW)	-
Operating funds (sum of items 4.1 - 4.15 from the profitability forecast)	-
Total capital needs	-

Source: Kreditanstalt für Wiederaufbau 2014

Table 10: Example of a cash-flow plan

		Jan	Feb	...	Nov	Dec	Total
1.	Paid-in capital	-	-	-	-	-	-
1.1.	Turnover (incl. VAT)	-	-	-	-	-	-
1.2.	Other incoming payments	-	-	-	-	-	-
1.3.	Total cash-flow intake	-	-	-	-	-	-
2.	Expenses	-	-	-	-	-	-
2.1.	Fixed capital investment	-	-	-	-	-	-
2.2.	Staff expenses	-	-	-	-	-	-
2.3.	Materials	-	-	-	-	-	-
2.4.	Operative expenses	-	-	-	-	-	-
2.5.	Loan redemption	-	-	-	-	-	-
2.6.	Interest	-	-	-	-	-	-
2.7.	Input/value-added tax	-	-	-	-	-	-
2.8.	Income and trade tax	-	-	-	-	-	-
2.9.	Business owner's wages	-	-	-	-	-	-
2.10.	Other expenses	-	-	-	-	-	-
2.11.	Total expenses	-	-	-	-	-	-
3.	Cash-flow balance						
	(1.3 minus 2.11)	-	-	-	-	-	-
4.	Cash-flow balance (aggregated)	-	-	-	-	-	-
5.	Financing	-	-	-	-	-	-
5.1.	Own capital	-	-	-	-	-	-
5.2.	Debt capital	-	-	-	-	-	-

Source: Kreditanstalt für Wiederaufbau 2014

Cash-flow plan

The cash-flow plan (table 10) shows that the future entrepreneur has sufficient funds to operate and balance the accounts every month. It focuses on the subsequent month and is a challenging exercise because numerous expenses must be made before the business can actually begin to run (applications, permits, rents, electricity, materials, office, telephone etc.), but it is impossible to determine exactly how much money

will come in. Moreover, even after the business has been started there may be liquidity bottlenecks, for example because invoices have not been paid yet, but the business needs to procure (and pay for) materials for a new order. Applicants need to take into account and prepare for such advance expenses. The balance of revenues and expenditure in the cash-flow plan will help to calculate the capital needs in principle.

Table 11: Example of a profitability forecast

		Financial year 1	Financial year 2	Financial year 3
1.	Net turnover	-	-	-
2.	Materials input	-	-	-
3.	Gross profit	-	-	-
4.	Operative expenditure	-	-	-
4.1.	Staff expenditure (incl. wages and non-wage labour costs)	-	-	-
4.2.	Rents	-	-	-
4.3.	Heating, electricity, water, gas	-	-	-
4.4.	Advertising	-	-	-
4.5.	Vehicle costs	-	-	-
4.6.	Travel costs	-	-	-
4.7.	Telecommunications costs	-	-	-
4.8.	Office materials	-	-	-
4.9.	Packaging	-	-	-
4.10.	Repairs/maintenance	-	-	-
4.11.	Insurance (liability insurance etc)	-	-	-
4.12.	Contributions to Chambers, trade associations etc	-	-	-
4.13.	Leasing expenditure	-	-	-
4.14.	Accounting, advice (notaries, lawyers etc)	-	-	-
4.15.	Other	-	-	-
	Total expenses	-	-	-
5.	Earnings (before taxes, depreciation and interest)	-	-	-
6.	Interest	-	-	-
7.	Income and trade tax	-	-	-
8.	Annual surplus/deficit	-	-	-
9.	Loan redemption	-	-	-
10.	Private insurance contributions	-	-	-
11.	Disposable income	-	-	-

Source: Kreditanstalt für Wiederaufbau 2014

Profitability forecast

The profitability forecast (table 11) compares expected expenses and expected profits. It should cover three years, with the third year being usually regarded as the most critical, as it is the year in which, often, the redemption of development loans starts. This may lead

to a jump in expenses. By then, entrepreneurs need to generate sufficient revenues to cover both current expenses and their own livelihood (and that of their family).

5.2.2 Registration of a business

Once the business, investment and cash-flow plans and the profitability forecast have been approved and the residence permit has been granted, the entrepreneur needs to register the business with the Trade Licensing Office. This registration is not equivalent to an application for a permit; rather, the Trade Licensing Office is formally notified of the existence of the new business. The procedure is the same for Germans, EU citizens and third-country nationals, provided that all other preconditions have been met.

This applies to both full-time and sideline self-employment. The free professions are exempt; independent professionals need to contact the tax office directly. Small entrepreneurs are obliged to make the registration notification (Section 14 of the German Industrial Code (Gewerbeordnung, GewO)), but the notification procedure is simple. In most cases, new entrepreneurs only have to complete a one-page form. They need to provide the reason for the notification and the following information:

- Name and legal form of the company,
- name and address of the entrepreneur,
- agents for the enterprise,²¹
- contact data of the enterprise (and branches, if any),
- activities of the enterprise and
- number of employees.

While the division of responsibilities is different in each federal state – in Bavaria or Rhineland-Palatinate, for example, the registration may be made with the Chamber of Industry and Commerce –, the procedure as such is identical. Once applicants have handed in the form, they will receive a confirmation of their business's registration in the local roll of trade (the so-called business license or "Gewerbeschein"). This confirmation is the basis for all other necessary notifi-

cations to the tax office, the competent local or register court (see Chapter 5.2.3), the Chambers of Industry, Commerce or Trade, the healthcare insurance fund, possibly the Federal Employment Agency and the relevant professional association.

Certain activities may require additional proofs of competence or qualification or special rooms. This applies to restaurants and bars (license to serve alcohol, "Schankerlaubnis"), to taxi and transport businesses (permit to transport persons), to the installation of gaming machines (permit by the local competent authority), to selling animals (animal protection requirements) or to selling weapons, ammunition or specific chemicals (criminal record certificate). The provisions of the Industrial Code and regional or local ordinances apply; these may differ from region to region or even from municipality to municipality.

Entrepreneurs need to notify the authorities not only of the establishment of their business, but also of changes to the operational structure, i.e. the opening of a branch or a move of the business. The same applies if the entrepreneur changes the range of products or services in such a way that the business purpose no longer has anything in common with the purpose mentioned in the original registration. Moreover, entrepreneurs have to inform the Trade Licensing Office of changes in the ownership structure (single owners or partners) and the close-down of the business. These rules apply to Germans, other EU or EEA citizens and third-country nationals.

5.2.3 Entry into the Trade Register

The business license is the most important document which future self-employed persons need before they take up their economic activities. However, before they really do so, they must check whether their business needs to be entered into the trade register as well.

Free professions and so-called small enterprises, i.e. natural persons and partnerships under civil law whose business does not require full commercial operations, are exempt from the registration. Small enterprises are, for example, small shops, kiosks or restaurants. Owners of such establishments are not obliged to have their businesses entered in the trade register (which is kept electronically by now), but may opt for a registration. If they do, their business activities are no longer subject to the provisions of the Civil

²¹ In contrast to leading employees with special knowledge, agents for the enterprise do not need to comply with the labour-market access procedure (Section 3 BeschV).

Code, but to those of the German Commercial Code. All other partnerships which run a business, including the GmbH (the most widespread legal type of business in Germany), must be entered in the register, as they are “business people” within the meaning of the Commercial Code (Section 1 HGB).²²

The trade register kept by the local court – which is usually the competent register court – is not identical with the non-public business register kept by the local authorities, even though much of the information is the same. The trade register includes information on the firm, its seat and business address, its branches, its legal form, its equity or share capital and its representatives. Moreover, these registers, which are publicly available, include lists of GmbH partners, the statutes of corporations and lists with the names of supervisory board members. Entrepreneurs need to notify the court of changes to the operative structure, the partnership structure or the number of permanent establishments or the opening of insolvency procedures, and this information must be entered in the register.

Small enterprises which do not have to be entered initially may be obliged to change their legal form and apply for a trade register entry later on if their business is successful, if they expand at their main seat or open branches or if they employ more people.

If the business must be entered in the trade register, the entrepreneur can apply for this entry once the business, investment and profitability plans have been approved. If there is more than one partner, for example in the case of a GmbH, it makes sense to have a notary draw up a partnership agreement. Once this agreement is signed by all partners, the notary can apply for entry in the trade register. In principle, a GmbH agreement requires a notarial deed. This rule is the same for both Germans and third-country nationals. If the future entrepreneurs need debt capital, the entry in the trade register may need to be made before they present their plans to the foreigners’ authority or – in

case of an application for a national visa – to the German embassy, as some banks require a trade register entry as a precondition for a loan commitment.

Moreover, the trade register entry may be crucial not only for future business owners, but also for intra-corporate transferees (see Chapter 2.3.2), who may hold a power of attorney which enables them to enter into almost any business on behalf of the company.²³ Subsidiaries or branches of foreign companies in Germany are treated as companies under German law, which is why a trade register entry is obligatory and the necessary application must be filed with the competent authority.

If several free professionals establish a partnership, for example a law firm or architecture or engineering firm, the partnership must be entered in the register of partnerships. Like the trade register, this register is kept by the competent register courts (usually the local courts), is accessible to the public and contains key information on the legal relationships of the enterprise.

5.2.4 Capital contribution

While there are no minimum investment amounts for investors or self-employed in Germany (see Chapter 2.2.2), minimum equity or share capital is required by law for certain types of business. These requirements apply to both German entrepreneurs and third-country nationals domiciled in Germany. Under German law, there is no formal minimum capital requirement for partnerships (GbR, OHG, KG, free professions and their partnerships). The situation is different for corporations, which require a minimum equity or share capital, which is mentioned in the notarized articles of association.

Establishing a GmbH requires at least EUR 25,000 of equity capital; the business may not be entered in the trade register until at least half of this sum (i.e. EUR 12,500) has been contributed in cash or in kind and booked on the GmbH’s account to be used by the managing director as he sees fit. Contributions in kind include

²² In this context, the terms “businessman” or “business people” do not denote a specific profession, but a legal construct. Such enterprises are thought to be so complex that a commercial organisation is necessary to ensure an adequate planning, steering and oversight of the operative activities. Key criteria are: the revenue and profit volume, the necessary investment and operative capital, the number and qualification of the employees, the size and number of permanent establishments, the type of business relationships and the range of services and products provided.

²³ This power of attorney is far-reaching, but not all-encompassing. Its holder may not encumber or sell business properties, file for a company insolvency or sign the tax declaration or the annual report. These acts are the prerogative of a “businessman”.

- intangible assets (such as licences, patents or trade marks),
- movable property (such as goods or materials),
- immovable property (such as real estate or buildings),
- financial assets (such as shares in other companies) and
- receivables (for example for services rendered or deliveries made).

The “Unternehmergeellschaft (haftungsbeschränkt)” (UG haftungsbeschränkt), which shares some similarities with the British “Limited” construction, is a relatively new legal structure. It is not a different legal form as such, but a variant of the GmbH, which, in return for very low equity requirements, has to meet certain additional requirements. A UG can be established with equity of only EUR 1.00, which is why 25 % of the profits must go into a statutory reserve to create the necessary equity capital of EUR 25,000 over the following years. Contributions in kind are not permitted. Once the equity capital is equivalent to EUR 12,500, the UG can become a GmbH, with all related rights and obligations.

A stock corporation (Aktiengesellschaft, AG) requires shareholder capital of at least EUR 50,000, independent of whether the company is to be traded on the stock exchange or not. Shareholder capital must not be confused with market capitalisation or equity. Again, contributions in cash or in kind are allowed, with at least 25 % of the shareholder capital to be paid in and available to the company. It is also possible to change an existing GmbH (or any other corporation) into a stock corporation. For details see the German Stock Corporation Act (Aktiengesetz, AktG).

A comparatively rare type which requires equity is the partnership limited by shares (Kommanditgesellschaft auf Aktienbasis, KGaA). It is, strictly speaking, a mix between a partnership and a corporation and does not have a board, like a stock corporation, but personally liable partners, the limited partners (Komplementäre). As it is the case with a stock corporation, the company’s articles of association contain the names of the partners, and the shareholder capital is EUR 50,000. It is subject to the Stock Corporation Act.

5.3 Types of businesses

Besides founding a new company, there are numerous other ways for foreign companies and entrepreneurs to branch out to Germany. In many cases, employed managing directors fulfil tasks which are comparable to those of self-employed entrepreneurs, for example in terms of meeting registering and notification obligations, which require sometimes extensive powers of attorney.

5.3.1 Cross-border direct business

Direct business activities are the simplest type of cross-border business activities. In this case, foreign entrepreneurs or investors do not need to establish their own infrastructure and therefore do not have to apply for a business licence. For many foreign direct businesses, residence-law requirements are irrelevant, as products and services are exchanged and offered via third parties.

5.3.2 Representative offices

In many cases, however, a representative office is established before direct business activities take place. Representative offices are often the first step of a company on the German market. They establish contacts and pave the way for transactions. Later on, they maintain the contact with potential customers. The main purpose of representative offices is to gain visibility in the host country. The head of the representative office often works alone or with a very small staff who can communicate fluently both in German and in their native language – and need to do so, as they act as intermediaries between the foreign company and its German customers. A representative office is legally dependent on its foreign parent company. It does not undertake own commercial activities for the foreign company and is therefore not regarded as a commercial business within the meaning of the Industrial Code. That is why it does not need to be entered in the trade register, but in the business register, as a business licence is mandatory. In some federal states (for example in Hamburg) representative offices from non-EU countries must be licensed not by the Trade Licence Office, but by the Consumer Protection Office. This is where the representative officer also has to present his valid residence permit (IHK Hamburg, n.y.).

Under residence law aspects, different rules may apply. If a foreign representative officer is newly employed but already resident in Germany, he or she will need a residence permit granted by the competent foreigners' authority which permits his being employed, for example pursuant to Section 18 AufenthG. In this case, the employee is a local employee in terms of contractual law. If, in contrast, a company employee is transferred to Germany – which is much more often the case, as the representative officers need to know the corporate culture, corporate philosophy and product range of their parent company well – he or she will need a residence permit for a certain purpose, which is why he or she will need to apply for a visa at the German embassy in his or her country of origin, except if entry is permitted without a visa.

5.3.3 Domestic permanent establishments

Domestic permanent establishments are offices or branches of a company which are steered from the headquarters abroad and are dependent on its directions, i.e. may not operate independently. These offices or branches mainly fulfil ancillary tasks to prepare, broker or conduct business of the foreign company. Domestic permanent establishments are subject to the provisions of the German Fiscal Code and bilateral double taxation agreements, if any (see Chapter 3.3.2); the details of the legal definitions may vary. Domestic permanent establishments include:

- Production premises without sales premises,
- warehouse, reception and shipping premises,
- broker offices and
- sales offices excluding procurement.

If a new permanent establishment is founded, the local Trade License Office must be notified; however, the permanent establishment will not be included in the trade register (IHK Hamburg, n.y.). The residence-law requirements for the director of a permanent establishment are comparable to those of the head of a representative office, provided that the director is a dependent agent. An approval by the Federal Employment Agency may be necessary. This applies, for example, to management employees who do not hold a power of attorney of the parent company (section 4 BeschV).

5.3.4 Branches of foreign companies

In contrast to domestic permanent establishments, branches of foreign companies are independent organisations, which do not, however, have their own legal personality. In terms of taxation, they are subject to the laws which govern the foreign parent company, even though, in principle, they might continue their business independent of the parent. As the business of a branch is similar to that of the parent company and its staff do not simply conduct ancillary tasks – as it is the case for the staff of a permanent establishment – the business structure will require the presence of an agent of the “businessman” who has more comprehensive powers. As a result, a branch must be licensed as a business and included in the trade register. The manager of a branch, on whose behalf the business license is granted, must be empowered to represent the branch independently (IHK Hamburg, n.y.). The residence-law prerequisites for the manager of a branch are similar to those for a head of a representative office or of a permanent establishment.

5.3.5 Subsidiaries

Subsidiaries are legally independent companies in which the foreign parent company holds a majority share. German subsidiaries are companies under German law. They have their own legal personality and are on an equal footing with German companies – including all rights and obligations (IHK Hamburg, n.y.). Employees transferred to Germany must be granted the necessary powers of attorney, as they can act largely independently, but are not self-employed within the meaning of residence law. Independent of the range of the power of attorney, they remain employees. So-called holders of procuration are agents of the “businessman” and subject to any professional orders; an approval by the Federal Employment Agency is not necessary if they provide a power of attorney (section 3 BeschV). The residence-law prerequisites are the same as for heads of representative offices, permanent establishments or branches.

As subsidiaries must be corporations under German law (Third Book of the Commercial Code, Part 2), they may have one of the following legal forms:

- Partnership limited by shares (KGaA),
- Limited liability company (GmbH) and

- Stock corporation (AG).

For all of these legal forms, the company must apply for a business license and an entry in the trade register. This entry will also include the names of the agents.

5.3.6 Joint ventures

The types of companies mentioned so far have one thing in common: They are all controlled by the foreign (parent) company. However, there are other legal forms which emphasise cooperation between equal partners. German law recognises

- consortiums (mainly on the basis of a partnership under the Civil Code (GbR)),
- cartels,
- syndicates (which are prohibited) and
- joint interest associations (in most cases organised as GbR-type partnerships or registered associations (e.V.)).

Legally and economically independent companies may also form strategic alliances to pursue common goals or enter into different types of joint ventures. A joint venture is a type of corporate cooperation which includes at least two partners. In a joint venture agreement, the partners set out their common goals, for example technology exchange, the establishment of a joint research department or a specialised division of labour in production. The partners share managing responsibilities and risks, but remain legally and economically independent entities.

The term “joint venture” usually refers to so-called “equity joint ventures”. This implies that the independent partners establish a new company and sign an agreement to form a new legal person, which – if the new company’s domicile is in Germany – needs to be licensed and entered into the trade register with all relevant data. Usually, the partners hold equal shares (50/50 or other equal breakdowns, depending on the number of partners). Other ratios, for example 60/40 for two partners, might suggest that one side tries to control the other. If the German partner company or the newly established joint venture company domiciled in Germany are to be managed by a third-country

national, the provisions of section 21 AufenthG apply. As managing such a company usually requires professional experience and a good knowledge of the German market, the managers of a joint venture will, as a general rule, be persons who have been living in Germany for years. They may therefore meet the conditions for a settlement permit pursuant to section 9 AufenthG or an EU long-term residence permit pursuant to section 9a AufenthG.

6 Measures and legal possibilities for abuse prevention

6.1 Legal framework

The term “misuse” covers regulatory offences, misdemeanours and felonies under German law. Regulatory offences are minor unlawful acts which are subject to regulatory fines, for example violations of notification obligations.²⁴ Misdemeanours and felonies are defined in the German Criminal Code (Strafgesetzbuch, StGB). Section 12 says: “(1) Felonies are unlawful acts punishable by a minimum sentence of one year’s imprisonment. (2) Misdemeanours are unlawful acts punishable by a lesser minimum term of imprisonment or by fine.”

As, in the field of business, residence-law misdemeanours and tax offences often go hand in hand, it is necessary that the financial and criminal authorities work together. This study will mention only the most important legal instruments to regulate cross-border investment and business activities:

The Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) contains the key provisions of German cartel and competition law (BKartA, n.y.; MWEIMH NRW, n.y.). Its provisions are supplemented by the Act against Unfair Competition (Gesetz gegen unlauteren Wettbewerb, UWG), which aims to protect the public against unfair commercial practices and safeguard its interest in undistorted competition (section 1 UWG). As certain investment amounts and shareholder models in companies are subject to notification obligations (see Chapter 2.1.4), the Foreign Trade and Payments Act (Außenwirtschaftsgesetz, AWG) and the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung, AWW) may be relevant. These acts contain

provisions which enable the Federal Government to prohibit investments of investors or entrepreneurs from third countries. In addition, the Securities Trading Act (Wertpapierhandelsgesetz, WpHG), which includes additional notification obligations for (resident) investors, and the Anti-Money Laundering Act (Geldwäschegesetz, GWG), which sets out the “know-your-customer” principle for banks, insurance companies, lawyers etc. and which applies to business partners from abroad, may play a role. Other obligations for entrepreneurs and individuals from Germany and from third countries may arise from the German Banking Act (Kreditwesengesetz, KWG), the Insurance Supervision Act (Versicherungsaufsichtsgesetz, VAG), the Payment Services Supervision Act (Zahlungsdienstenaufsichtsgesetz, ZAG) and the Capital Investment Code (Kapitalanlagegesetzbuch, KAGB) (BaFin, n.y.). However, the Posted Workers Act (Arbeitnehmerentsendegesetz, AEntG) and the Act to Combat Illegal Employment (Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG) refer more directly to residence-law issues.

6.1.1 Posted Workers Act

In principle, services can be provided freely across borders between Germany and most third countries. However, posting workers in Germany for the purpose of service provision is ruled by certain legal provisions, which aim to prevent an abuse of the right to provide services freely across borders. The framework is set out in the Posted Workers Act. This Act aims at creating and implementing adequate minimum standards for posted workers regularly employed in Germany and at ensuring a fair and functioning competition. The overarching goal is to maintain employment which is subject to social security contributions and ensure collective bargaining autonomy to keep the social peace (section 1 AEntG). Minimum labour standards (paid holidays, minimum wages etc.) depend on the

²⁴ See the Act on Regulatory Offences (Gesetz über Ordnungswidrigkeiten, OWiG).

provisions of the collective wage agreements for the specific sectors, with the most important sectors being expressly mentioned in section 3 AEntG. These are the sectors where most posted workers work and where violations of the current law have been particularly frequent in the past:

1. Construction industry and ancillary industries in the sense of the Ordinance on the Construction Industry (Baubetriebe-Verordnung),
2. building cleaning industry,
3. mail delivery services,
4. security services,
5. special services in mining for black coal mines,
6. industrial textile cleaning services,
7. waste disposal, including road cleaning and winter services,
8. professional training services pursuant to Book II or III of the Social Security Code (SGB) and
9. butchering and meat processing.

Employers who post their workers to Germany in order to provide works and services must not only comply with the collective wage agreements and provide proof of this compliance, but also register their workers beforehand with the German customs administration and provide the following information (section 18 AEntG):

- Names, Christian names and birth dates of all workers to be posted,
- starting date and expected period of posting,
- location of work; construction site for construction services,
- place in Germany where the documents listed in section 19 AEntG (paid holiday claims, paid minimum wages) are kept,
- name, Christian name and date of birth of the responsible person in Germany or an agent and
- sector in which the workers are to be posted.

Moreover, employers can be required to provide their time schedules if the intended working times are to be outside 6:00 a.m. and 10:00 p.m. These notification obligations also apply to companies domiciled

in countries with which Germany has signed work or guest worker agreements (see Chapter 2.3.2).

There are irregular, but frequent controls of construction sites and workplaces by customs officers who have police rights; foreigners who cannot provide valid documents may face residence-law consequences. Any violations of the notification obligations by employers may result in a fine of up to EUR 500,000 (section 23 AEntG) and employers may be (temporarily) excluded from public tenders.

6.1.2 Act to Combat Illegal Employment

The Act to Combat Illegal Employment aims to combat illegal employment and the related tax evasion and focuses on criminal law aspects (von Briel 2004). According to the legal definition, illegal labour is provided or accepted by someone who provides or orders services or work and

1. as an employer, entrepreneur or self-employed person who is subject to insurance requirements does not meet the notification, contribution or recording obligations under social security law which arise from the services or work rendered,
2. as a taxpayer does not comply with his tax obligations arising from the services or work rendered,
3. as a recipient of social security benefits does not comply with his notification obligations to the social security system arising from the services or work rendered,
4. as a provider of services or work does not comply with the obligation to notify the authorities of his taking up a business (section 14 GewO) or has not obtained the necessary Itinerant Trader's Licence („Reisegewerbekarte“, section 51 GewO),
5. as a provider of services or work runs a skilled trade without being registered in the skilled trade register (section 1 of the skilled trade code) (section 1 sub-section 1 SchwarzArbG).

Under criminal law, a key issue is whether a person is an employee and subject to directions or self-employed. If the black labourer is an employee, the criminal-law consequences focus on the employer who has not complied with the obligation of notifying the authorities of the employment contract and with tax and social security obligations; employees are only held accountable if they participated actively in the tax and social security evasion. Checks are made

by customs officers in close cooperation with the tax offices of the federal states. They are also supported by the Federal Employment Agency, the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway, the social security contributions agencies, the pension insurance and accident insurance providers, the social security providers, the authorities responsible under the Act on Benefits for Asylum Seekers (Asylbewerberleistungsgesetz), the authorities listed in section 71 sub-sections 1 – 3 AufenthG, the Federal Office for Goods Transport, the state authorities responsible for occupational safety, the state police authorities and the authorities responsible for following up administrative offences (section 2 sub-section 2 SchwarzArbG). The act is not restricted to certain sectors of the economy, but lists certain sectors (in section 3) where black labour was particularly frequent in the past. People who work in the following sectors are obliged to keep their identity cards, passports or substitute documents with them at all times pursuant to section 2a sub-section 1 SchwarzArbG:

1. The construction industry,
2. the restaurant and hotel industry,
3. the persons transport industry,
4. the transport and logistics industry,
5. the showpeople industry,
6. the forestry industry,
7. the building cleaning industry,
8. companies which work in trade fair and exhibition construction,
9. the meat processing industry.

There are irregular controls, and violations of these rules may result in a fine of up to EUR 300,000. Moreover, employers who employ foreigners at significantly worse terms and conditions than Germans may face prison sentences of up to five years (section 10 SchwarzArbG).

Bogus self-employment is a major problem from a tax-law vantage point. Bogus self-employment takes place if a person who provides work or services to a company claims to be self-employed, but is, in fact, a dependent employee. In the past, the authorities have found a number of “entrepreneurs” who allegedly had only one client. Section 1 sub-section 2 no. 1 of the current version of the Act to Combat Clandestine Employment defines bogus self-employment as a version of black labour. The authority monitoring illegal em-

ployment (Finanzkontrolle Schwarzarbeit, FKS), which is part of the German customs authority, is responsible for combating illegal employment. Withholding workers’ contributions to social security is an offence under criminal law (section 266a StGB) and subject to fines and the retrospective payment of the social security contributions.

6.2 Recording of cases of abuse

Residence-law offences of the professions listed above (for example illegally obtaining a residence permit as self-employed) are not separately mentioned in the police criminal statistics. Seeing that economic crimes, including fraud and insolvency crimes, have a share of about 1.2 % in all registered crimes, it may be assumed that residence abuse is limited to individual cases. The criminal statistics do not include economic crimes prosecuted by the specialised prosecutors’ offices or by the financial authorities without any police involvement (BKA 2014: 257). There are no figures on the number of cases which also touch upon residence-law issues.

7 Analyses, studies and reports

The following chapter gives a short overview of recent studies and reports on the economic actors and professional groups mentioned above.

7.1 Investors from third-countries

Figures on foreign direct investment are collected by Deutsche Bundesbank and included in the “Außenwirtschaft” (External sector) section of its “**Makro-ökonomische Zeitreihen**” (macroeconomic time series) and the “**Zahlungsbilanzstatistiken**” (balance of payments statistics). While the statistics and charts themselves are largely uncommented, they give a comprehensive overview of the volume of German investments abroad and foreign investments in Germany. They make it possible to draw conclusions about the countries where capital comes from and about the sectors in which investments are made (Deutsche Bundesbank 2014a/b).

Published by	: Deutsche Bundesbank
Type of publication	: electronic database
Date	: regularly updated

The Federal Ministry for Economic Affairs and Energy releases a monthly series called “**Schlaglichter der Wirtschaftspolitik**”, which reports recent economic issues and developments in Germany and on international trends which affect the country. These studies also contain (at irregular intervals) information on foreign and migration-specific economic and investment issues (BMWi 2014b).

Published by	: BMWi
Type of publication	: regular series
Date	: released monthly

PM & Partner Marketing Consulting GmbH published a study on the investment climate in eastern Germany

commissioned by the Federal Ministry of the Interior and the Federal Government Commissioner for the New Federal States. The study with the title “**Analyse der Wahrnehmung und Bewertung des Investitionsstandortes Ostdeutschland bei internationalen Investoren**” breaks down investment activity by states and economic sectors, shows how eastern Germany is perceived by foreign media and analyses specific characteristics of eastern Germany as a business location and the satisfaction of foreign investors and entrepreneurs (PM&P 2010).

Published by	: PM&P
Type of publication	: single study
Date	: released in 2010

A study which was jointly published by the Federation of German Industries, the Cologne Institute for Economic Research (IW Köln) and PricewaterhouseCoopers (PwC) looks at the investment climate in Germany. “**Investieren in Deutschland – Die Sicht des Investors**” contains comprehensive statistical data and analyses structural weaknesses, investment foci and specific characteristics of different investment locations. The study draws general conclusions, emphasises the links between the German economy and the world economy and does not limit itself to foreign investments (BDI et al. 2011).

Published by	: BDI, PwC, IW Köln
Type of publication	: single study
Date	: released in 2011

The Federation of German Industries also released a strategy paper entitled “**Ausländische Direktinvestitionen in Deutschland**” which underlines, on the basis of statistical figures, the importance of foreign direct investment for Germany as a business location. The authors warn that it is not sufficient to create favourable legal and economic framework conditions; popular

acceptance of foreign direct investments is necessary as well. The study emphasises the sheer volume of the investments, the number of jobs which depend on them (about 2.6 million) and the growing importance of investments from the emerging markets (BDI 2013).

Published by : BDI
 Type of publication : single study
 Date : released in 2013

The Leibniz Institute for Regional Geography (IFL) has published a study on the investment behaviour of the BRIC countries (Brazil, China, India and Russia). **“Direktinvestitionen aus den BRIC-Staaten in Deutschland”** analyses the volume and spatial distribution of investment amounts. The study concludes that Russian investors are the most visible and active investors from the BRIC countries, both in Germany as a whole and in particular in the eastern states (Golinski et al. 2013).

Published by : IFL
 Type of publication : single study
 Date : released in 2013

A short study by economist John P. Weche Gelübcke critically looks at take-overs of German companies by foreign investors – an issue on which there is not much literature so far. The study **“Ausländische Unternehmen und Übernahmeeffekte – neue Fakten für Deutschland”**, which was released in the Journal Wirtschaftsdienst published by the German National Library of Economics (ZBW), analyses data which raise doubts about the general assumption that productivity increases after a take-over. In addition, they show that take-overs have negative effects on employment (Weche Gelübcke 2013).

Published by : ZBW Kiel
 Type of publication : single study
 Date : released in 2013

7.2 Business owners

Current figures on gainful employment and self-employment are included in the subject-matter series 1, series 2.2 of the Federal Statistical Office. The report

“Bevölkerung und Erwerbstätigkeit. Bevölkerung mit Migrationshintergrund”, which was published in 2013, analyses the results of the microcensus 2012. It includes all basic data on the gainful employment of immigrants, on the economic sectors in which they are active, on their educational and vocational qualifications, on their hours of work and other specifics. The data on the income structure permit to draw conclusions about the degree of economic integration and about tax and social security contributions (Destatis 2013).

Published by : Federal Statistical Office
 Type of publication : regular series
 Date : released annually

Moreover, the annual report of the Federal Office for Migration and Refugees (BAMF) contains comprehensive statistics and analyses. **“Das Bundesamt in Zahlen”** gives information about labour and economic migration and focuses on economically relevant issues such as educational and vocational qualifications, following spouses and the structure of the immigrant population in Germany (BAMF 2014).

Published by : BAMF
 Type of publication : regular series
 Date : released annually

A study by Andreas H. Block and Isabell Klingert from the Federal Office for Migration and Refugees focuses on the **“Immigration by self-employed and freelance migrants from third countries to Germany”** (available only in German). On the basis of survey data, the report deals with residence-law issues, the length of self-employment, the level of education, the investment amounts and the income situation of self-employed and freelance migrants (BAMF 2012).

Published by : BAMF
 Type of publication : single study
 Date : released in 2012

In its annual Start-up Monitor, Kreditanstalt für Wiederaufbau gives information on start-up activities in Germany. Part of the report focuses on immigrant entrepreneurs. The 2014 issue, which is entitled **“Existenzgründungen durch Migranten: Gründungs-**

lust belebt das Geschehen”, sheds light on the professional backgrounds of migrants, their business ideas, potential difficulties in obtaining capital, their age structure and their origins (Metzger 2014c).

Published by : KfW
 Type of publication : regular series
 Date : released annually

A study by Friedrich-Ebert-Stiftung (FES) analyses what migrant enterprises mean for Germany as a business location. **“Ökonomische Bedeutung und Leistungspotenziale von Migrantenunternehmen in Deutschland”** uses official statistics and own surveys to analyse economic effects, social implications and cross-border activities. The methodology part explains in detail why the data situation is so difficult and which statistical problems arise (Langhauser/Leicht 2014).

Published by : FES
 Type of publication : single study
 Date : released in 2014

A study prepared by the Institut für Mittelstandsforschung (IfM) and commissioned the Federal Ministry for Families, Senior Citizens, Women and Youth focuses on **“Vereinbarkeit von Familie und Beruf in Migrantenunternehmen in Deutschland”**. Based on survey results and comprehensive empirical materials, owner-led enterprises, their effects on employment, their employee structures and their needs in terms of creating a better work-life balance are analysed (Berwing et al. 2013).

Published by : IfM Mannheim, BMFSFJ
 Type of publication : single study
 Date : released in 2013

7.3 Other business persons

The National Regulatory Control Council (Nationaler Normenkontrollrat, NKR) and the federal states of Hesse and Saxony have jointly published a comprehensive report on process optimisation. The **“Projektbericht über die Optimierung des Verfahrens zur Einreise von Fach- und Führungskräften aus**

Drittstaaten” was authored by representatives of local administrations and private companies, who relied on their experience in employee integration. The report contains optimisation proposals for the entry procedure for skilled workers which can be implemented in the short to medium term (NKRK 2011).

Published by : NKR
 Type of publication : single study
 Date : released in 2011

The National Regulatory Control Council has the task of making proposals to reduce bureaucracy and examine follow-up costs of new laws. The results are published in its **“Annual Reports”**. Just like legislation itself, the foci may be very different. The Report for 2012, for example, deals with information obligations and bureaucracy costs for citizens and businesses (NKRK, n.y.).

Published by : NKR
 Type of publication : regular series
 Date : released annually

The German National Tourist Board (Deutsche Zentrale für Tourismus, DZT) publishes information on the economic importance of foreign business travelers in its regular market surveys, which are supported by the Federal Ministry for Economic Affairs and Energy. These reports list overnight stays, spending and employment effects and make international comparisons (DZT 2013/14).

Published by : DZT
 Type of publication : regular series
 Date : 2013/14

The study **“Migrantisches Unternehmertum im Land Brandenburg”** was drafted in the framework of the promotional programme “Integration durch Qualifizierung” (IQ). It analyses quantitative data on self-employed migrants and regional differences in the federal state of Brandenburg and also includes qualitative interviews and portraits of entrepreneurs. Based on the different migration backgrounds (refugees, GDR contract workers, ethnic German resettlers etc.) and qualifications (university degree, unrecognised educational and professional qualifications etc.) of the

self-employed and freelance professionals who were surveyed for the study, the report focuses opportunities and difficulties, makes statements on networking and qualification needs and gives other recommendations for action (IQ Netzwerk Brandenburg 2013).

Published by : IQ Netzwerk Brandenburg
Type of publication : single study
Date : released in 2013

8 Problems and obstacles

While investors and entrepreneurs are treated almost the same during the acquisition process, the public debate in the media paints a mixed picture. There has been a controversial discussion on the importance of foreign investors in the last few years.

Nevertheless, it has been possible to attract large numbers of investors and high amounts of capital to Germany in the last few years. Numerous companies from third countries have settled in the eastern German states after the reunification and helped to create an economic structure and a sector mix which have turned out to be resilient in the recent European economic crisis. As in all other German regions, the economy in eastern Germany can rely on healthy small and medium-sized companies. Nevertheless, some structural deficits in the eastern German states will be resolved only in the long run. Observers often describe the economic structure in eastern Germany with the term “extended workbench”: companies domiciled in the eastern German states are market oriented and flexible in their production and may be highly specialised within existing group structures, but remain dependent on directives and rarely have their own research and development departments. Even though a highly qualified public and private university and research landscape has been created, R&D (which often attracts high capital inflows) needs to be improved further. In addition, the capital of international companies domiciled in third countries often flows out of the country due to complex tax offsetting procedures. As a result, the local and state governments cannot use these funds for reinvestment in the infrastructure. While this problem affects all German states, it is particularly evident in eastern Germany, where there is a lack of important group headquarters and/or representative offices to Germany – even though there are some large and medium-sized companies who are among the market leaders in their niches (“hidden champions”) – take, for example, NILES-Simmons Industrieanlagen GmbH for machinery and equipment or KOMSA AG for communications equipment.

Another problem is that it is difficult to attract skilled employees and entrepreneurs to Germany. While the share of foreign students at German universities and universities of applied sciences has steadily risen over the last few years and many of them work in Germany after having obtained their degree (Hanganu/Heß 2014), this development does not apply to non-academic skilled workers (BMWi 2014a: 28-36). It is uncertain whether non-EU nationals even know that Germany is trying to attract not only engineers, but also skilled technicians, mechatronics specialists or (new) self-employed. While the Recognition Act and the Employment Ordinance have made labour market access much easier for third-country nationals, even workers who have much professional experience may be faced with major difficulties if they cannot provide formal certifications of their qualifications. At the same time, formal qualifications give only limited insight into a person’s actual knowledge and capabilities. This fact is increasingly taken into account in the admission procedure for self-employed workers, even though the formal hurdles may still be very high (despite generous recognition practices). If the Chamber of Industry or Commerce finds, during the admission procedure, that the applicant has not gained sufficient practical professional experience, it may reject a business concept even though it is sound in theory. While the German embassies and foreigners’ authorities are not bound by this decision, the Chambers’ integrity and professional knowledge is held in high regard.

In addition to formal qualifications and professional experience, the length of the visa procedure and of the procedure to grant a residence permit are two key problems which may hamper quick labour-market access. This applies to all groups, even though the length of the procedure differs depending on the number of institutions and authorities involved. The National Regulatory Control Council’s proposal to optimise the entry procedure (2011) examined the maximum time which may pass between the visa application and the granting of the work and residence permit. According

to estimates by the involved companies, the waiting times are as follows:

- skilled workers 8 weeks
- scientists 5 weeks
- interns 7 weeks
- intra-corporate transferees 4 weeks

These are average figures; for all groups of employees, the waiting period may range from 2 – 3 weeks to up to 7 – 11 weeks. The net processing time of an application was estimated at 140 – 270 minutes in the study (NKRK 2011: 49, 123), which means that the procedure takes so long due to internal delays. Some proposals have already been implemented. If the applicant has not been to Germany before, the approval of the foreigners' authority is usually waved. Thus, the average length of proceedings has been shortened appreciably.

Moreover, the time and effort involved in establishing a business should not be underestimated. Language barriers, lack of legal knowledge, financing difficulties and other problems may accumulate and lead to significant delays. A study of the business establishment activities of Chinese and Vietnamese migrants in Leipzig showed that establishing a business takes three to six months (Dornberger et al. 2009: 18 et seq.). There are no figures on how many third-country nationals simply stop trying to found a business before they obtain a business license.

9 Good practices and lessons learned

Promotional policies by the federal government and the federal states are regularly criticised by academics and the media. The criticism usually centres on the question whether it makes more sense to subsidise a broad range of projects (the current approach) or to pursue a regional cluster strategy. Quite apart from the fact that it is necessary to reassess the efficiency of current structures from time to time, the promotional policies of the last few years have obviously caused numerous entrepreneurs and investors from third countries to invest in Germany. In addition, they have encouraged employees to become self-employed.

The public is not sufficiently aware of the importance of immigrant businesses, even though the entrepreneurial landscape in Germany has changed considerably during the past decades. This may be due to the fact that the extent of foreign economic activities is not visible at first sight; small shops, craftsmen's enterprises and individual businesses predominate in the high streets of the country. As a matter of fact, however, about 760,000 of 4.4 million self-employed persons in Germany have a migration background. According to different estimates, which use different definitions of certain economic indicators, they employ 2.2 – 2.7 million employees (Langhauser/Leicht 2014: 71). Successful entrepreneurs are regarded as examples of good integration, as they take responsibility for themselves and are often ambassadors for Germany, as quite a lot of them generate part of their turnover abroad. This is one reason why immigrant entrepreneurs are so important – and sometimes, they receive awards because they can serve as examples.

The city of Munich, for example, created the “PhoenixPreis” in 2010. It goes to entrepreneurs with an immigrant background and may be awarded to entrepreneurs from third countries. The award is endowed with EUR 4,000 and can be distributed among up to four entrepreneurs whose businesses have done well,

who have created jobs and apprenticeships and who have made a contribution to improve cross-cultural relations. In 2014, the city of Dortmund awarded its “Ethnischer Wirtschaftspreis” (endowed with EUR 10,000) for the second time; the criteria are similar to those used in Munich. As a sign of mutual appreciation, the “Multikulturelles Forum”, the economic promotion authorities of the cities Hamm, Unna and Dortmund and the “Verein selbständiger Migranten” jointly award the “Interkultureller Wirtschaftspreis”, for which businesses from the western Ruhr area can apply if they have worked to improve the cross-cultural competences of their employees. These awards, too, can go to entrepreneurs from third countries. In addition, there is a host of regular economic awards, which are regularly handed out to successful entrepreneurs with an immigrant background.

10 Conclusion

Apart from residence-law issues, third-country nationals, Germans or EU or EEA nationals have to meet roughly the same requirements and comply with the same notification obligations if they want to establish a new business. In recent years, residence-law rules for third-country nationals have been streamlined. For example, the minimum investment amount of EUR 250,000 for entrepreneurs and investors was abolished in 2012. While it is impossible to create a causal relationship between the deletion of this paragraph of section 21 AufenthG and the clear increase in entry numbers of self-employed people between 2012 and 2013,²⁵ the abolishment of this requirement has helped to improve the overall investment conditions.

Generally speaking, investment conditions are currently regarded as good (OECD 2013), and the importance of foreign investments for Germany as a business location cannot be overestimated. The same is true for the number of businesses established and run by third-country nationals, as these enterprises pay tax and social security contributions and often employ family members, employees and apprentices. Thus, immigrant businesses help to improve integration and, in the medium to long term, to make sure that Germany can rely on a pool of skilled workers.

In the last few years there have been several new legal provisions concerning gainful employment which affect the activities of investors and entrepreneurs from third countries – even though their main focus is on dependent employment, such as the Recognition Act and the Employment Ordinance. While it is not possible to create a causal relationship between the new rules and the increase in the number of self-employed, formal qualifications and professional experience are a key precondition for obtaining a residence permit pursuant to section 21 AufenthG, which is necessary to

establish a business. In any case, the measures taken so far will help to make the system more flexible.

25 Push factors in the countries of origin might be another reason; however, it was impossible to examine this theory in the framework of this study, despite the breakdown by countries of origin.

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